U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: SAN FRANCISCO Date: OCT 0 2 2008

MSC 05 075 21249

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, San Francisco, California. 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 14, 2005. The director issued a Notice of Intent to Deny (NOID) the application on November 18, 2005. Upon review of the record including the November 29, 2005 response to the NOID, the director denied the application on April 3, 2006 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 for the applicant submits a brief.

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 applicant attempted to file the application. 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 or attempting to file the application. 8 C.F.R. § 245a.2(b)(1).

Under the CSS/Newman Settlement Agreements, for purposes of establishing residence and physical presence, in accordance with the regulation at 8 C.F.R. § 245a.2(b)(1), "until the date of filing" shall mean 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).

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).

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 evidence to establish his entry into the United States prior to January 1, 1982 and continuous unlawful residence since such date through the date he attempted to file the application. The AAO only considers evidence that is directly relevant to the January 1, 1982 through May 4, 1988 time period and any other evidence that might reflect upon the applicant's credibility.

On the Form I-687, the applicant indicated he had last entered the United States on August 30, 2003 with advance parole. The record contains a photocopy of a Form I-94 for the applicant stamped showing the applicant was paroled into the United States pursuant to Section 212(d)(5) of the Act, (LIFE ACT) on August 30, 2003.[1] The applicant also indicated on the Form I-687 that he had previously filed for temporary residence as a legalization applicant on October 27, 2000 in Mesquite, Texas and that he had another record with Citizenship and Immigration Services (CIS) under the A number [redacted][2]

The applicant listed his addresses for the pertinent time period as: [redacted], Stockton, California from November 1981 to October 1982; [redacted], Lodi, California from October 1982 to September 1984; [redacted], Lodi, California from October 1984 to September 1987; and [redacted], Brooklyn, New York from September 1987 to December 1990. The applicant indicated he was employed in Stockton, California for [redacted], as a laborer from April 1982 to October 1988.

The record includes a photocopy of a Form I-95A, Crewman's Landing Permit with the applicant's name and date of birth and showing that he arrived August 17, 1981 at Galveston, Texas. The record also

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[1] The record does not include a copy of a Form I-131, Request for Advance Parole, or any documents supporting a request for parole. CIS records reveal that the applicant submitted a Form 131, Request for Advance Parole on April 22, 2003 which was subsequently approved on May 12, 2003.

[2] The record includes evidence that the applicant applied for asylum and the A number given for that application was [redacted]. The record of proceeding for [redacted] has been consolidated into the record of proceeding for [redacted]

includes a photocopy of a U.S. Department of Immigration and Naturalization Service document showing a date of arrival as November 27, 1981 in Seattle, but that does not identify the holder of the document. The record further includes:

- An affidavit notarized September 18, 1997, signed by [redacted] who declares that he is a resident of San Rafeal, [sic] California and that he has personally known the applicant, a resident of Santa Rosa, California since January 1982 and that he and the applicant also lived together in Santa Rosa from 1991 to 1993.

- An affidavit notarized October 20, 1997 signed by [redacted], a resident of [redacted], Brooklyn, New York, who declares that he has personally known the applicant, a resident in Santa Rosa, California, since 1987.

- A declaration dated July 22, 1998 signed by [redacted] who declares that he shared an apartment with the applicant at [redacted] in Brooklyn, New York between December 1987 and December 1990.

- A document signed by [redacted] on June 29, 1991 and attested to by a notary public of the Mamhood Sultan Advocate in Pakistan, wherein the affiant declares that he is the brother of the applicant and that the applicant returned to Pakistan from the United States on November 5, 1987 for the funeral of their maternal uncle and that the applicant left Pakistan for the United States on December 8, 1987.

- A photocopy of a document on the letterhead of Bank of America Karachi Branch, dated October 1, 1981 referencing [redacted] and a remittance credited to his account in Pakistan.

- Photocopies of partial envelopes bearing indiscernible postmarks and postmarks after the relevant time period.

On November 18, 2005, the director issued a NOID to the applicant. The director referenced the applicant's Form I-589, Application for Asylum and for Withholding of Deportation, the applicant's testimony in regard to the asylum application, as well as other documents in the applicant's record. The director questioned whether the applicant had established his attempt to file an application for legalization between May 5, 1987 and May 4, 1988, and thus his eligibility to apply for this benefit. The director also noted statements in the applicant's testimony at a deportation hearing in front of an immigration judge regarding his asylum application that appeared inconsistent with the applicant's written and verbal testimony regarding his legalization applications. The director indicated that the United States Immigration and Naturalization Service, Legalization Unit, determined that the applicant was not *prima facie* eligible for membership under the CSS Settlement Agreement as the applicant had obtained a legalization card by means of fraud. The director also noted the affidavits of [redacted], and the declaration of [redacted] and found that these documents

did not provide sufficient evidence to establish that the applicant had resided in the United States prior to January 1, 1982 and continuously until 1986. The director further noted that the applicant had not provided sufficient documentation to substantiate the applicant's claimed employment, continuous residence, or continuous physical presence and that the affidavits submitted were specific only to the periods after 1987.

Upon review of information submitted in response to the NOID and the totality of the record, the director denied the application on April 3, 2006. The director found inconsistencies in the applicant's testimony at his deportation hearing and claims made in his efforts to legalize his status. The director found that the applicant had submitted a legalization application in 1991 that was determined to be fraudulent as the applicant had obtained a legalization card by means of fraud. The director determined that the applicant had been ordered removed from the United States and that the Board of Immigration Appeals dismissed the applicant's appeal of the denial decision on his Form I-589 application on March 11, 2002; thus the applicant was inadmissible under section 212(a)(9) of the Act when he entered the United States in August 2003. The director further found that the applicant had not met his burden of proof in establishing: he had attempted to file an application between May 5, 1987 and May 4, 1988; he had continuously resided and was physically present in the United States since January 1, 1982; and that the government was aware as of January 1, 1982 that he had remained in the United States in an unlawful status after being granted a crewman's landing permit to temporarily stay in the United States.

On appeal, counsel for the applicant asserts that the transcript of the applicant's testimony at his deportation hearing is not part of the record in the applicant's legalization matter and even if it is proper for the director to consider this information, it does not present conflicting testimony regarding attempts the applicant made or did not make to apply for legalization. Counsel contends that the applicant was not given notice and opportunity to respond to previous allegations that his 1991 legalization application was fraudulent and that there is no evidence that his 1991 legalization application was formally denied or any appellate review was offered or received for any such denial. Counsel avers that the applicant sought admission to the United States in August 2003 with advance parole, that the applicant was entitled to travel under the LIFE Act, and that the ground of inadmissibility (section 212(a)(9)) of the Act was waived and is not a legal basis to deny legalization. Counsel contends that the applicant was not required to establish that his unlawful status as an "overstay" was known to the government. Counsel asserts that the evidence of record establishes that the applicant has resided in the United States in an unlawful immigration status from 1981 through 1988.

The AAO has reviewed the evidence of the record and focuses first on the issue of whether the applicant has established by a preponderance of the evidence that he has resided in the United States in an unlawful status for the requisite periods. **In this matter he has not. The AAO finds that the applicant has** established that he entered the United States prior to January 1, 1982. The AAO finds the applicant's crewman landing permit probative and this document shows the applicant arrived in the United States on

August 17, 1981.[3] The record, however, provides insufficient evidence that the applicant resided in the United States from January 1, 1982 through the requisite time period.

The applicant has submitted one affidavit to establish his residence in the United States from January 1, 1982 to sometime in 1987. In the September 18, 1997 affidavit signed by [redacted], the affiant declares that he has known the applicant since 1982 and that he and the applicant lived together from 1991 to 1993, a time subsequent to the requisite time period. The affiant does not include any statements that detail the circumstances and events of how he met the applicant, the period of the affiant's personal association with the applicant, or the addresses the applicant lived at during the association. The affidavit is void of any details of the interactions, if any, between the affiant and the applicant during the requisite time period. The affidavit is deficient in any details that would tend to corroborate the accuracy of the information in the affidavit. The affidavit is not probative in establishing the applicant's continuous unlawful residence in the United States from January 1982 through the requisite time period.

The AAO has also reviewed the affidavit signed by and the declaration signed by [redacted]. Mr. in his October 20, 1997 affidavit declares that he has known the applicant since 1987 and although indicating he currently (1997) lives at the same address as the applicant claimed to have lived at from September 1987 to December 1990 makes no mention of this fact. In addition, similar to the affidavit of [redacted] discussed above, [redacted] does not include any information regarding how he met the applicant or any continued association. The affidavit lacks any details about the applicant during the attested period that would demonstrate the truth of the affiant's inference that the applicant lived in the United States during the time period of the applicant and the affiant's association. Similarly, the July 22, 1998 declaration signed by [redacted] while declaring that the applicant shared an apartment with him between December 1987 and December 1990 does not provide any additional information regarding the claimed relationship. The declarant does not include any details describing how he met the applicant and subsequent interactions during their association. The declaration does not contain details or information that would assist in verifying the claimed relationship. Neither the affidavit nor the declaration is probative of the applicant's continuing residence in the United States during the requisite period.

The AAO has examined the document signed by the applicant's brother attesting to the applicant's appearance in Pakistan from November 5, 1987 to December 8, 1987; a photocopy of a Bank of America Karachi Branch letter referencing a remittance to an account in Pakistan; and photocopies of partial envelopes bearing indiscernible postmarks and the envelopes bearing postmarks after the relevant time period. These documents do not contain sufficient identifying information or descriptions to establish the applicant's residence in the United States during the applicable time period. These documents are neither probative nor relevant to establish the applicant's continuous residence in the United States from January 1, 1982 through the requisite time period.

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[3] Although the photocopy of the U.S. Department of Immigration and Naturalization Service document showing a date of arrival as November 27, 1981 in Seattle, may be the reverse side of the applicant's Form I-95A, Crewman's Landing Permit, the lack of the original document and the lack of identifying information on this document makes such a conclusion speculative.

The deficient documentation and the applicant's statement comprise the only evidence of the applicant's residence in the United States from prior to January 1, 1982 through the requisite time period. This information lacks probative value for the reasons noted. The absence of credible and probative documentation to corroborate the applicant's claim of continuous residence for the entire 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. The applicant has failed to meet his burden of proof and failed to establish continuous residence in an unlawful status in the United States from prior to January 1, 1982 through the date he claims to have 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.

The AAO will also address the director's determination that the applicant was inadmissible to the United States under section 212(a)(9) of the Act and counsel's assertion on appeal that the inadmissibility ground was waived. The record shows that the applicant was ordered removed from the United States on March 11, 2002. Although as footnoted above, CIS computer records show that the applicant was granted advance parole on May 12, 2003; there is no documentation in the file or in CIS computer records showing that the applicant applied for a waiver of a ground of inadmissibility or that such waiver was granted. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The director's improper approval of a request for advance parole does not alter the requirement to file and obtain a waiver of a ground of inadmissibility. The director's determination that the applicant was inadmissible when entering the United States on August 30, 2003 is affirmed. For this additional reason, the application will not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The application will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

The appeal will be dismissed.

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