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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEW YORK Date: OCT 06 2006

MSC 05 213 10341

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.

for 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 May 1, 2005. The applicant was interviewed on or about January 18, 2006 in connection with her Form I-687. On July 6, 2006 the director issued a Notice of Intent to Deny (NOID) the application. Upon review of the record, the director denied the application. On appeal, counsel for the applicant submits a brief.

The director's denial is based upon the applicant's failure to address and overcome the deficiencies noted in the NOID. There the director determined that the "personal affidavits" submitted in support of the application "appear neither credible nor amenable to verification." The director found that the affidavits were not credible because, they did not include, in the words of the decision:

> a government-issued photo ID identifying the affiant, some proof that the affiant was in the United States during the statutory period. Some proof [that] there was a relationship between the applicant and affiant such as photos, etc., and a current working telephone number at which the affiant may be contacted for verification.

The director observed that an affidavit signed by [redacted] which the director described as a "sample affidavit": lacked proof that the affiant was in the United States during the statutory period; lacked proof of direct personal knowledge of the event being attested to; was inconsistent with the applicant's own interview statements ("and given your own statements at interview is assumed spurious"); and was hearsay, because "based upon the word of someone well known whom he considers to be honest." The director also observed that the applicant stated at her interview that she left the United States in September 1987 to attend to her ailing father but that the Form I-687 indicated no absences outside the United States since the applicant's arrival in 1981. The director also described a 1982 receipt as "fictitious" and "clearly fraudulent" because the receipt included an area code that the director found was not in effect in 1982. The director found that the fraudulent nature of the receipt rendered it difficult if not impossible to lend any credence whatsoever to the applicant's oral testimony or to any of the other documentation/evidence that the applicant provided in support of the application. The director found a lack of credible documentation generated during the requisite period.

The AAO finds that the criteria listed by the director for determining the credibility of the evidence are erroneous, as they are narrower than the standards in the relevant regulation, at 8 C.F.R. § 245a.2(d), on documentation, burden of proof, and evidence. However, this error is remedied by the AAO's review, in that the AAO's review is a *de novo* review that independently analyzes all of the evidence of record - without reliance on or deference to the director's analysis – and in accordance with the governing regulations.

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). The regulation at 8 C.F.R. § 245a.2(d)(6) states that, to meet his or her burden of proof, an applicant must provide evidence of eligibility apart form his or her own testimony; that the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility; and that, in judging the probative value and credibility of the evidence submitted, greater weight will be given to the submission of original documentation.

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 credible evidence to establish her entry into the United States prior to January 1, 1982 and continuous unlawful residence since such date through the date she attempted to file, or was discouraged from filing, the application.

On the Form I-687 that is the subject of this appeal, the applicant listed her date of birth as February 23, 1965. The applicant indicated she lived at: [redacted], Ozone Park, New York from November 1981 to December 1984; [redacted], Astoria, New York from January 1985 to November 1987; and [redacted], Astoria, New York from December 1987 to February 1990. The applicant indicated on the Form I-687 that she had not left the United States since January 1, 1982. The applicant listed her employment as a factory worker from December 1981 to July 1989 for Dynamic Plastics Corp. located in East Elmhurst, New York.

The record also contains a Form I-687 filed December 29, 1989 providing similar information, except that the applicant indicated she had left the United States in September 1987 to visit her parents in Bolivia for a month.

As supplementary evidence to the applicant's Forms I-687, the record contains the following information relating to the pertinent time periods:

- An October 26, 1989 letter signed by [redacted], Associate Pastor of the Church of St. Sebastian, who indicates that a person whose testimony he considers honest had told him that the applicant had lived in the United States since October 1981. This statement is not probative, as it provides no information from which to determine the basis and reliability of the knowledge that the declarant to Reverend Sanchez possessed about the applicant's residence.

- A photocopy of an employee card issued to the applicant by Dynamic Plastics Corp., showing the issue date as March 15, 1989. This card is not probative, as it does not relate to the requisite time period.

- A form letter, that appears to be dated February 1, 1990, that is written on the letterhead of Dynamic Plastics Corp. of East Elmhurst, New York, and bears the notarized signature of [redacted] signing as "Bookkeeper." By insertions at the appropriate blank lines, this form letter provides the following information about the applicant's employment:

  > [The applicant] was employed with Dynamic Plastics Corp. from 12/12/81 until 07/09/89. Her salary was $120.75 for a 40 hour week.

- A photocopy of a receipt from "[redacted]s" identifying that store as located in Astoria, New York, with a 718 prefix for its telephone number. The receipt appears to be dated on February 19, 1982 and shows the name [redacted] As noted above, the director dismissed this as a fraudulent document on the basis of the area code - 718- that the director found to not be in effect in 1982.

- A photocopy of a receipt for $25 issued to [redacted] on April 16, 1985 from the Tiffany Agency for a one-hour class. The AAO recognizes this document only as some evidence of little weight, that, on the date of the receipt, the applicant was staying at the New York address referenced on the receipt, which is an address cited on her Form I-687.

- Photocopies of envelopes addressed to the applicant at [redacted]t, Ozone Park, New York. The envelopes bear legible postmarks of La Paz, Bolivia cancelled on 1.-XII-82; 7.VIII-83; and 14-IIII-81. One envelope bears a postmark with the date 29 __ 81, but the country and month of the postmark are illegible. On one envelope the postmark is completely illegible except for the numeral "28."

- One photocopy of an envelope addressed to the applicant at [redacted] Astoria, New York that bears a cancelled postmark of La Paz, Bolivia on 18 IIII _4;

- **An affidavit dated April 20, 1990 by** [redacted] declaring that she has known the applicant "since [the applicant] resided in New York," and that the applicant left the United States only in September 1987 to return to Bolivia for one month. Ms. [redacted] does not specify the period that the applicant has resided in New York, when her association in the United States with the applicant began, or how long it lasted.

- An affidavit dated November 22, 1989 signed by _____ residing at [redacted], Ozone Park, New York declaring that she had met the applicant in Queens, lived close to her, and had become friends with her. A second affidavit signed by [redacted] on December 28, 1989 wherein the affiant declared that the applicant had lived in her "house/apartment" at [redacted]t, Ozone Park, New York from November 1981 to December 1984. Attached to the second affidavit is a lease agreement for October 1, 1981 to February 30, 1984 that shows as tenant of a first-floor apartment at the Drew Street address.

- **An affidavit, dated December 28, 1989, in which** [redacted] declares that he resided at [redacted], Astoria, New York and that the applicant lived at his house/apartment from January 1985 to November 1987. Attached to the affidavit is a lease agreement for December 1, 1984 to November 30, 1987 that identifies Mr. [redacted] as tenant at the Astoria address. In a second affidavit of December 28, 1989, [redacted] attests that he "met [the applicant] in my neighborhood shortly after he [sic] came to this country and [has] known him [sic] ever since. This affidavit also

attests to the applicant's addresses from November 1981 to the time of the affidavit, and those addresses match the addresses that the applicant listed on the Forms I-687 that appear in the record. In a third affidavit, dated April 27, 1990, [redacted] certifies that he had known the applicant "when she came to live in [his] apartment," and that the applicant left the United States in September of 1987 and came back in the same month and year.

- An affidavit dated November 22, 1989 signed by residing at [redacted] New Jersey declaring that he had met the applicant in the New Jersey area, that they had lived close to each other, and that they had become friends. Mr. Almonte does not state when he met the applicant or how long he has been associated with her in the United States.

- An affidavit dated November 22, 1989 signed by [redacted] residing at [redacted] New York, New York, declaring that he had met the applicant in the New York area, that they had lived close to each other, and that they had become friends. Mr. [redacted] does not state when he met the applicant or how long he has been associated with her in the United States.

On January 31, 2006, the director issued a NOID observing: that the affidavits submitted appeared neither credible nor amenable to verification; that the applicant stated at her interview that she had left the United States in September 1987 but had indicated on the Form I-687 that she had never left the United States; and that the receipt the applicant had submitted from "[redacted]" was clearly fraudulent as the 718 area code was not operational in 1982.

In rebuttal to the NOID, counsel for the applicant stated that the adjudicating officer had failed to comment on the envelope cancelled by the U.S. Postal Service and mailed to the applicant in 1981. On July 6, 2006, the director issued a second NOID citing the same concerns as observed in the January 31, 2006 NOID and adding that the Bolivian postmarks were highly suspect. The applicant did not submit a rebuttal and on August 18, 2006, the director denied the application for the reasons stated in the NOID.

On appeal, counsel for the applicant asserts that the introduction of the 718 area code occurred officially on September 2, 1984. Counsel asserts that the 718 area code was approved by the Federal Communications Commission (FCC) in 1980 and introduced to the general public in 1981 as an alternative area code for affected areas. Counsel notes that the use of the 718 area code was permissive on September 2, 1984 and became mandatory in December 1984. Counsel asserts that although the receipt the applicant submitted from "[redacted]" is dated in 1982, "presumably, the storeowner chose to reorder 10,000 receipts with the 718 area code prior to the 'permissive' period to avoid a costly reprint after the 'mandatory' period." Counsel submits a printout from the www.areacode-info.com website for the 1980s showing that the use of the new 718 area code was permissive on September 2, 1984 and mandatory on December 31, 1984. The printout does not identify any time period prior to September 2, 1984 that indicates the 718 area code had been introduced to the general public or could be used by the

general public. Counsel does not provide any evidence that the "[redacted]" storeowner ordered receipts with the 718 area code more than two years prior to the mandatory use of the 718 area code.

The AAO finds that the receipt from [redacted]" allegedly issued to the applicant is a photocopy, does not contain the applicant's entire name, and is questionable as it contains an area code that was not operational until more than two years after the receipt was written. The AAO acknowledges counsel's assertions on appeal but without documentary evidence to support the claim, the assertions of counsel will not satisfy the applicant'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). It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Moreover, the evidentiary rule at 8 C.F.R. § 245a.2(d)(6) provides: "[i]n judging the probative value and credibility of the evidence submitted, greater weight will be given to the submission of original documentation." The AAO accords no weight to the photocopy of the "[redacted]" receipt.

Likewise, the receipt from the Tiffany Agency, that shows a date for a one time purchase in April of 1985, is a photocopy. The AAO notes that the date on this photocopy appears on a line designated not for a date but for a number (it reads: "No. ____"). The evidentiary rule that 8 C.F.R. § 245a.2(d)(6) states with regard to non-original documents applies here and to all photocopies submitted into the record by the applicant. That is, in judging the probative value and credibility of the evidence produced by the applicant, greater weight will be given to original documentation. In light of this being a photocopy and the placement of the date on a number line, the AAO accords little evidentiary value to this document.

The AAO does not find probative the letter from Dynamic Plastics Corp. regarding the applicant's claimed employment from December 12, 1981 to July 9, 1989. The letter does not comply with the criteria found at 8 C.F.R. § 245a.2(d)(3)(i) which requires that the employer include the applicant's address at the time of employment, periods of layoff, duties with the company, and whether the information was taken from official company records, where the records are located, and whether the Service may have access to the records.

The AAO also notes that the applicant's Dynamics Plastics Corp employment card shows an issue date of March 15, 1989, a time period not relevant to establishing the applicant's entry into the United States prior to January 1, 1982 and continuous residence for the requisite period.

As the director noted, the letter signed by does not identify the applicant as a member of the church and does not indicate the Reverend has personal knowledge of the applicant's entry into the United States and residence thereafter. Therefore, the letter is not probative.

Five envelope copies submitted by the applicant are addressed to her at the address that she listed on her Form I-687 for November 1981 to December 1984 (that is, [redacted], Ozone Park, New York). The AAO accords no evidentiary weight to the envelope copy that has an illegible postmark date. The

three envelope copies with fully legible postmarks indicate the following mailing dates from Bolivia: April 14, 1981; December 1, 1982; and August 7, 1983. Another envelope copy indicates a mailing on the 29th day of an illegible month in 1981. The AAO recognizes these four envelope copies with legible and partially legible postmarks as evidence tending to show the applicant's presence in New York at the postmark dates. However, the AAO observes that the envelopes submitted by the applicant are photocopies and, as such, merit less evidentiary weight than would original envelopes, on which signs of alteration would be generally more obvious. The AAO again notes the evidentiary rule at 8 C.F.R. § 245a.2(d)(6) that "[i]n judging the probative value and credibility of the evidence submitted, greater weight will be given to the submission of original documentation." In light of this evidentiary rule, the fact that copies would not as clearly indicate address alterations as would originals, and the overall evidentiary context of this proceeding, which includes the questionable "[redacted]" receipt, the AAO does not accord any significant evidentiary weight to the envelope copies with fully or partially legible postmarks.

The AAO finds no probative value in the envelope copy addressed to the applicant at [redacted], Astoria, New York, from Bolivia bearing a cancelled postmark of La Paz, Bolivia on 18.-III-_4. As the year of the mailing is not evident, this document has no probative value.

The AAO has also reviewed the affidavits submitted from [redacted], and [redacted]. As discussed below, the AAO accords no significant evidentiary value to these affidavits, alone or in combination.

As noted earlier in this decision, [redacted], and [redacted] do not specify when they first met the applicant in the United States, their periods of association with the applicant in the United States, or the addresses that the applicant may have had during that association. Therefore, these affidavits are, at most, some evidence of the applicant's presence in the United States for an undetermined period. As such, and due to their lack of corroborative details, they are not probative of the applicant's continuing residence in the United States for the requisite period.

[redacted] and [redacted] do not specify the periods of their asserted association with the applicant: [redacted] declares that she and the applicant lived together in an Ozone Park, New York apartment from November 1981 to December 1984; and [redacted] declares that the applicant lived at his Astoria, New York apartment from January 1985 to November 1987. Each of these affiants provided a lease that indicates their tenancy for the attested periods. However, the extent of the information that these affiants provide about their shared living arrangements with the applicant is minimal. The information does not include details about the applicant during the attested periods and about the applicant's association with the affiants that would demonstrate the truth of the affidavits' assertions about the applicant's residence. The affidavits do not contain details or information that would assist in verifying the asserted associations. Likewise, the affidavits of [redacted], and [redacted] are also deficient in details that would corroborate the accuracy of the affidavits.

The absence of sufficiently detailed and probative evidence to corroborate the applicant's claim of continuous residence for the entire requisite period detracts from the credibility of her 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. As stated earlier in this decision, the regulation at 8 C.F.R. § 245a.2(d)(6) states that an applicant must provide evidence of eligibility apart from his or her own testimony; that the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility; and that, in judging the probative value and credibility of the evidence submitted, greater weight will be given to the submission of original documentation.

As indicated in the preceding analysis of the evidence of record, the applicant has not provided sufficient credible and probative evidence to substantiate her application by a preponderance of evidence. The evidentiary deficiencies that have been noted in this decision include, but are not limited to, the following. The affidavits and statements submitted by others in support of the application do not contain substantive information about the applicant and about interaction with her during the attested periods that would corroborate these documents' assertions of knowledge of the applicant's residence or presence in the United States. Three witness affidavits do not even assert the periods of association with the applicant. The submitted copies of envelopes and receipts have little evidentiary value, as discussed. The authenticity of the "[redacted]s" receipt - which had been noted by the director - remains suspect. The associate pastor's statement has little weight, as it is based upon uncorroborated assertions by an unidentified source. The Dynamic Plastics letter of employment does not provide the scope of information required by the regulation on the establishment of residency by employer letters. Therefore, its reliability has not been established. In sum, the totality of the evidence submitted by the applicant is insufficient to establish entry into the United States prior to January 1, 1982 and continuous unlawful presence for the requisite period. 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. Further, as stated at 8 C.F.R. § 245a.2(d)(6), to meet his or her burden of proof, an applicant must provide evidence of eligibility apart form his or her testimony.

Upon review of the totality of the record including the evidentiary deficiencies noted above, the AAO determines that the evidence is insufficient to establish entry into the United States prior to January 1, 1982 and continuous unlawful presence for the requisite time period. Due to the lack of sufficient probative and credible evidence in support of the application, it is concluded that the applicant has failed to meet her 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 she attempted to file, or was discouraged from filing, 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 appeal will be dismissed.

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