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

PUBLIC COPY

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FILE:

MSC-05-342-12847

Office: NEW YORK

Date: OCT 07 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:

SELF-REPRESENTED¹

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

¹ [REDACTED] filed the appeal in this matter on June 18, 2007. On May 7, 2008, he was suspended from practice of law before the Executive Office for Immigration Review (EOIR) and the Department of Homeland Security. Accordingly, the applicant will be considered self-represented in this proceeding.

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.

On appeal, former counsel asserts that the applicant's entries into the United States in 1980, March 1984 and October 1987 were without inspection. Counsel states that the birth of the applicant's son does not contradict his testimony. Counsel states that the applicant applied for his Indian passport, dated May 14, 1986, by mail. Counsel states that the passport was mailed to the applicant at his address in India and his father received it for him. Counsel states that the applicant cannot explain the reason the envelope postmarked in 1983 does not have an imprint from the United States post office. Counsel states that the Sikh Center gave the applicant the receipt. Counsel states that the Sikh Center should have been contacted to find out the truth. Counsel notes that the applicant cannot produce any primary evidence because he was illegal and afraid.

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 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.

At issue in this proceeding is whether the applicant has submitted sufficient credible evidence to meet his burden of establishing continuous unlawful residence in the United States during the requisite period. Here, the applicant has failed to meet this burden.

The record shows that the applicant submitted a Form I-687 Application and Supplement to Citizenship and Immigration Services (CIS) on September 7, 2005. At part #30 of the Form I-687 application where applicants are asked to list all residences in the United States since first entry, the applicant showed that during the requisite period he resided at [REDACTED] Jersey City, New Jersey from February 1981 until January 1985 and [REDACTED], Woodside, New York from February 1985 until June 1988. Notably, the applicant left blank parts #31 and #33 of the application. Part #31 requests applicants to list their affiliations with any organizations. Part #33 requests applicants to show their employment history in the United States.

The applicant submitted the following documentation:

- An affidavit from [REDACTED] notarized in India on April 4, 2006. This affidavit states that the applicant left India to go abroad in 1976. However, the affidavit fails to mention where the applicant resided during the requisite period. Therefore, it is without any probative value as evidence of the applicant's residence in the United States during the requisite period.
- An envelope addressed to the applicant bearing Indian postage stamps and postmarked February 6, 1983. This envelope is probative evidence that the applicant was present in the United States in February 1983.
- A receipt from the Sikh Center of New York, Inc. located in Flushing, New York. This receipt indicates that the applicant donated \$51.00 to the Sikh Center on March 23, 1981. The phone number listed on the receipt for the Sikh Center is [REDACTED]. However, the area code 718 was not in use in Queens until 1985. A Bell Atlantic Press Release on the issuance of the 347 area code provides, in part, "[t]he 212 area code was introduced in 1945 and served all of New York City for 40 years. The 718 area code was introduced in 1985, replacing the 212 area code in Brooklyn, Queens and Staten Island."² Furthermore, the applicant left blank part #31 of the Form I-687, where applicants are asked to list their affiliations with any organizations. Given these inconsistencies, this document is without any probative value as evidence of the applicant's residence in the United States during the requisite period.

The record shows that in May 1990 the applicant submitted to the Immigration and Naturalization Service a Form I-687 application for a determination of his class membership in *CSS v. Meese*. The applicant indicated on this application that during the requisite period he was self-employed as an umbrella salesman at 42nd Street in Time Square from March 1981 until January 1985 and as a salesman in a candy store at Christopher Street in New York from February 1985 until June 1988. Notably, the applicant did not provide this information on the instant application.

The applicant furnished the following documentation with his initial Form I-687:

- A fill-in-the-blank affidavit from [REDACTED], dated May 7, 1990. This affidavit states that the applicant is his friend and to his personal knowledge the applicant resided during the requisite period in Jersey City, New Jersey from February 1981 until January 1985 and Queens, New York from February 1985 until June 1988. This affidavit fails to provide any information on how [REDACTED] first became acquainted with the applicant in the United States. Additionally, it does not give any information on their relationship in the United States during the requisite period. Given these deficiencies, this affidavit is without any

² <http://www.prnewswire.com>

probative value as evidence of the applicant's residence in the United States during the requisite period.

- A second affidavit from [REDACTED], dated May 7, 1990. This affidavit states that the applicant was in India from September 1987 until October 28, 1987. Since this affidavit provides no information on the applicant's residence in the United States, it is without any probative value in this proceeding.
- A copy of the applicant's passport, issued in India on May 14, 1986. However, the applicant did not indicate on his Form I-687 that he was in India on this date. Therefore, this passport undermines the credibility of the applicant's claim of continuous residence in the United States during the requisite period.

On February 7, 2007, the director issued a Notice of Intent to Deny (NOID) to the applicant. The director found that the applicant furnished no evidence of his January 1981 entry into the United States. The director stated that during the applicant's interview he testified that he had the following absences from the United States: February 1984 until March 1984; September 1987 until October 1987; and July 1989 until August 1989. The director determined that the applicant submitted no corroborative evidence for these absences. The director stated that on the applicant's initial Form I-687 as well as during the applicant's interview he stated that he had a son born in India on December 12, 1984. The director found that this information shows that he was in India in 1984. The director determined that the applicant's envelope, postmarked 1983, is of suspect authenticity since it bears no imprints from a United States post office. The director determined that the receipt from the Sikh Center of New York, dated March 23, 1981, is fraudulent since it bears the area code 718, which was not used in the Queens Borough in New York City until 1984. The director determined that the affidavit from [REDACTED] is neither credible nor amenable to verification. The director stated that there is no proof that Mr.

[REDACTED] has direct personal knowledge of the events and circumstances of the applicant's residency. The director concluded that the applicant failed to submit credible documents that constitute by a preponderance of the evidence his residence in the United States during the requisite period. The director afforded the applicant a period of 30 days to submit additional evidence in rebuttal to the NOID.

In rebuttal to the NOID counsel asserted that the applicant's entries into the United States in 1980, March 1984 and October 1987 were without inspection. Counsel stated that the birth of the applicant's son in India on December 12, 1984 is consistent with the applicant's visit to India from February 1984 until March 1984. Counsel stated that the applicant cannot explain the reason the envelope does not bear a United States post office imprint. Counsel stated that the applicant has lost contact with [REDACTED]

The applicant furnished the following additional documentation in rebuttal to the NOID:

- A notarized letter from [REDACTED], dated February 28, 2007. This letter states that he met the applicant in Jackson Heights during the early summer of 1988. Since this letter fails to specify the exact month he first met the applicant, it cannot be determined whether they first became acquainted during the requisite period. Therefore, this letter is without any probative value as evidence of the applicant's residence in the United States during the requisite period.
- An affidavit from [REDACTED] dated February 26, 2007. This affidavit states that the applicant is his childhood friend and visited him in Sacramento, California at the end of 1988. Since this letter fails to specify the exact month the applicant visited him in Sacramento, it cannot be determined whether he had contact with the applicant in the United States during the requisite period. Therefore, this letter is without any probative value as evidence of the applicant's residence in the United States during the requisite period.

On June 1, 2007, the director issued a Notice of Decision to deny the application. In denying the application the director determined that since the applicant failed to submit any corroborative evidence such as a passport, boarding pass, luggage tag, bank or credit card statements, money transfer receipts, receipts and photos, his testimony regarding his travel is not credible. The director found that the applicant submitted no corroborative evidence regarding his trip to India from February 1984 until March 1984. The director noted at the applicant's initial Form I-687 does not list his 1984 trip to India. The director determined that the applicant was issued a passport on May 14, 1986 in India, which is inconsistent with his claim that he was residing in the United States on that date. The director found that the envelope postmarked in 1983 bears no imprints from a United States post office. The director determined that for this reason it fails to prove that it was legitimate mail that was delivered to the applicant's residence by the United States postmaster. The director determined that the statements from [REDACTED] and [REDACTED] do not attest to the applicant's residency in the United States during the requisite period. The director concluded that the applicant failed to meet his burden of proof in the proceeding.

The director was correct in her decision to deny the application based on the applicant's failure to establish residence in the United States during the requisite period. However, there was an error in her analysis of the evidence. The director determined that since the applicant failed to submit any corroborative evidence such as a passport, boarding pass, luggage tag, bank or credit card statements, money transfer receipts, receipts and photos, his testimony regarding his travel is not credible. 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 claim of residence in the United States during the requisite period, the submission of any other relevant document is permitted pursuant to 8 C.F.R. § 245a.2(d)(3)(vi)(L). Nevertheless, the director's actions must be considered to be harmless error as the AAO conducts a de novo review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility as required by the regulation at 8 C.F.R. § 245a.2(d)(6).

On appeal, former counsel asserts that the applicant's entries into the United States in 1980³, March 1984 and October 1987 were without inspection. Counsel states that the birth of the applicant's son does not contradict his testimony. Counsel states that the applicant applied for his Indian passport, dated May 14, 1986, by mail. Counsel states that the passport was mailed to the applicant at his address in India and his father received it for him. Counsel states that the applicant cannot explain the reason the envelope postmarked in 1983 does not have an imprint from the United States post office. Counsel states that the Sikh Center should have been contacted to find out the truth about the alleged fraudulent receipt. Counsel notes that the applicant was illegal and afraid and cannot produce any primary evidence.

It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Id.* In this case, counsel fails to address the inconsistencies regarding the applicant's passport and the Sikh Center receipt with independent objective evidence or an explanation from the applicant. Counsel instead addresses the inconsistencies in the evidence with his own unfounded assertions. However, 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).

Doubt cast on any aspect of the applicant's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. *Matter of Ho*, 19 I&N Dec. 582, 591. The applicant submitted as evidence of his residence in the United States during the requisite period, four affidavits and a notarized letter. As noted, these documents are without any probative value because they lack considerable detail on the authors' relationship with the applicant in the United States during the requisite period. The one document that is of some probative evidence is the envelope addressed to the applicant bearing Indian stamps with a postmark of February 6, 1983. However, the probative value of this document is limited as only evidence of the applicant's presence in the United States in February 1983. Pursuant to 8 C.F.R. § 245a.2(d)(6), the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility. The applicant has failed to provide credible, reliable and probative evidence of his continuous residence in the United States during the entire requisite period.

In conclusion, the absence of credible and probative documentation to corroborate the applicant's claim of continuous residence for the entire requisite period, as well as the inconsistencies and contradictions noted in the record, seriously detract 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

³ It should be noted that counsel asserted in rebuttal to the NOID and on appeal that the applicant entered the United States in 1980. However, the applicant indicated on his Form I-687 that he entered the United States in 1981.

amenability to verification. Given the inconsistencies in the record and the lack of credible supporting documentation, it is concluded that he 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.