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

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[redacted]

FILE: [redacted] Office: HARTFORD Date: SEP 23 2008

MSC 05 306 12010

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, Hartford. The matter is now before the Administrative Appeals Office 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 (the Act), and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet.

The director found that the applicant had been absent from the United States for a total of more than 180 days during the period of requisite residence and was therefore ineligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements. The director also found that the applicant had failed to show that he initially entered the United States prior to January 1, 1982. The director denied the application for this additional reason.

On appeal, counsel asserted that the evidence submitted is sufficient to demonstrate the applicant's eligibility, and more specifically, that the applicant had only been absent for 90 days during the requisite period.

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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1255a(a)(2). The applicant must also establish that he or she has been continuously physically present in the United States since November 6, 1986. Section 245A(a)(3) of the Act, 8 U.S.C. § 1255a(a)(3). The regulations clarify that the applicant must have been physically present in the United States from November 6, 1986 until the date of filing the application. 8 C.F.R. § 245a.2(b)(1).

For purposes of establishing residence and physical presence under the CSS/Newman Settlement Agreements, the term "until the date of filing" in 8 C.F.R. § 245a.2(b)(1) means until the date the applicant attempted to file a completed Form I-687 application and fee or was caused not to timely file during the original legalization application period of May 5, 1987 to May 4, 1988. CSS Settlement Agreement, paragraph 11 at page 6; Newman Settlement Agreement, paragraph 11 at page 10.

The applicant has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite period, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status. The inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. 8 C.F.R. § 245a.2(d)(5).

As to the requirement of continuous residence in the United States from January 1, 1982 through the date the application is filed, the regulation at 8 C.F.R. § 245a.2(h)(1) provides that an applicant shall be regarded as having resided continuously if no single absence during the salient period was longer than 45 days and the aggregate of all absences does not exceed 180 days.

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. 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.

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 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.

On the Form I-687 application, which the applicant signed on July 20, 2005, the applicant was required to provide an exhaustive list of his residences in the United States since his first entry. As part of that residential history, the applicant stated that, from March 1981 to June 1988, he lived at [redacted]

The applicant was also required to provide an exhaustive list of all of his employment in the United States since January 1, 1982. As part of that employment history, the applicant stated that he worked from April 1981 to April 1988 as a self-employed "labor worker" in Greenfield, California.

The pertinent evidence in the record is described below.

- The record contains a form affidavit, dated January 16, 2006, from [redacted] who states that he has known the applicant since 1982 but does not state when the applicant entered the United States, or when, or even whether, he lived there. That affidavit is not relevant to any matter material to the approvability of the instant application.

- The record contains an almost identical form affidavit, dated January 13, 2006, from [redacted][1] who states that he has known the applicant since 1981 but does not state when the applicant entered the United States, or when, or even whether, he lived there. That affidavit is not relevant to any matter material to the approvability of the instant application.

- The record contains an almost identical form affidavit, dated January 16, 2006, from [redacted] who states that he has known the applicant since 1986 but does not state when the applicant entered the United States, or when, or even whether, he lived there. That affidavit is not relevant to any matter material to the approvability of the instant application.

- The record contains another almost identical form affidavit, dated January 16, 2006, from [redacted] who states that he has known the applicant, his brother-in-law, since 1981 but does not state when the applicant entered the United States, or when, or even whether, he lived there. That affidavit is not relevant to any matter material to the approvability of the instant application.

- The record contains a statement that the applicant signed at his January 17, 2006 interview. In that statement the applicant admitted that he was absent from the United States from September 1984 to October 1984, from June 1985 to July 1985, from December 1986 to January 1987, and from June 1988 to August 1999.

- The record contains another affidavit from [redacted]. In this affidavit, which is dated April 28, 2006, [redacted] stated that he has lived in the United States since 1981 and that the applicant is his brother-in-law. He further stated that the applicant entered the United States during March 1981 and lived at [redacted] from then until June 1988, after which he returned to India. He stated that during August 1999 the applicant returned to the United States, and has been living with the affiant, at [redacted] Connecticut, since then.

- The record contains a photocopy of another affidavit from [redacted] which is almost identical to the April 28, 2006 affidavit of [redacted] In [redacted] affidavit, which is dated March 1, 2006, the affiant gives the same residential history for the applicant as [redacted] provided. [redacted] also stated that he first met the applicant during 1981, when the applicant and [redacted] came from California to visit him in Arizona.

The record contains no other evidence pertinent to the applicant's residence in the United States during the salient period.

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[1] The affiant's name is not entirely legible, and this rendering is approximate.

In the Notice of Decision, dated April 3, 2006, the director denied the application, finding that the applicant had admitted to absences totaling more than 180 days during the period of requisite residence. The director also noted that the applicant submitted evidence insufficient to show that he initially entered the United States prior to January 1, 1982.

On appeal, counsel asserted that the applicant had been absent only 90 days, at intervals, during the period of requisite residence, but provided no evidence in support of that assertion. Counsel also provided the April 28, 2006 affidavit of [redacted] and the March 1, 2006 affidavit of [redacted], both of which are described above.

The issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate entry into the United States prior to January 1, 1982, and continuous residence during the requisite period.

As was noted above, 8 C.F.R. § 245a.2(h)(1) provides that an applicant's residence shall be regarded as continuous if no single absence during the salient period exceeded 45 days and the aggregate of all absences did not exceed 180 days.

The applicant admitted to being absent from September 1984 to October 1984, from June 1985 to July 1985, from December 1986 to January 1987. The director found that these absences totaled more than 180 days.

If the applicant was absent from the United States for the entirety of all six of those months, then he was absent for 184 days. Those described absences may, on the other hand, have encompassed only six days.[2] The director was free to request additional evidence on that point, but did not. The applicant has admitted to three absences during the period of requisite residence that may have encompassed more than the allowable 180 days, and when challenged on that point, has provided no evidence that they did not. This office will decide the case based on the evidence now in the record.

The April 28, 2006 affidavit of S[redacted]ar and the March 1, 2006 affidavit of [redacted]at are the only material evidence in this matter make no assertions pertinent to the applicant's admitted absences from the United States. The only indication that the applicant was not absent for more than 180 days during the period of requisite continuous residence is counsel's assertion on appeal that he was not. Counsel's assertions on appeal are not evidence, and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503 (BIA 1980).

This office finds, nevertheless, that the applicant's statement that he was absent from the United States from September 1984 to October 1984, from June 1985 to July 1985, from December 1986 to January 1987 was an insufficient basis for finding that he was absent more than 180 days. The applicant has overcome that basis of the decision of denial.

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[2] This would be so if the applicant were absent from September 30 to October 1, from June 30 to July 1, and from December 31 to January 1.

However, the director also found that the applicant had failed to demonstrate that he entered the United States prior to January 1, 1982. This office will also consider that finding. The affidavits of [redacted] are the only evidence offered in support of the proposition that the applicant entered the United States prior to January 1, 1982.

The April 28, 2006 affidavit of [redacted] stated, "I have been in regular touch with [the applicant since he entered the United States]," but without further characterizing the nature and frequency of that contact and in what way it indicated that the applicant was, in fact, in the United States. The basis of the affiant's assertion that the applicant was in the United States prior to January 1, 1982 is therefore unclear. That affidavit will be accorded no evidentiary weight for the proposition that the applicant initially entered the United States prior to January 1, 1982.

In his March 1, 2006 affidavit, [redacted] stated, as his basis for asserting that the applicant was in the United States prior to January 1, 1982, that the applicant visited him in Arizona during 1981. That affidavit will be accorded slight evidentiary weight for the proposition that the applicant entered the United States prior to January 1, 1982, but is insufficient, in itself, to sustain the applicant's burden of proof. The applicant has not, therefore, demonstrated that he entered the United States prior to January 1, 1982. The application was correctly denied on this basis, which has not been overcome on appeal.

The evidence must be evaluated not by the quantity of evidence alone but by its quality. 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 its amenability to verification. Given the paucity of credible supporting documentation the applicant has failed to meet his burden of proof and failed to establish continuous residence in an unlawful status in the United States during the requisite period. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis. The application was correctly denied on this basis, which has not been overcome on appeal. The appeal will be dismissed.

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