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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEW YORK Date: APR 06 2009

MSC 05 223 10688

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.

IN 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.

John F. Grissom
Acting 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 Director, New York, New York, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The district director determined that the applicant had not demonstrated that he had continuously resided in the United States in an unlawful status since before January 1, 1982 through the date that he attempted to file a Form I-687, Application for Status as a Temporary Resident, with the Immigration and Naturalization Service or the Service (now U.S. Citizenship and Immigration Services or USCIS) in the original legalization application period between May 5, 1987 to May 4, 1988. Therefore, the district director concluded that the applicant was not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements and section 245A of the Immigration and Nationality Act (Act) and denied the application.

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 presence in accordance with the regulation at 8 C.F.R. § 245a.2(b), "until the date of filing" shall mean until the date the alien attempted to file a completed Form I-687 application and fee or was caused not to timely file, consistent with the class member definitions set forth in the CSS/Newman Settlement Agreements. Paragraph 11, page 6 of the CSS Settlement Agreement and paragraph 11, page 10 of the Newman Settlement Agreement.

An alien applying for adjustment of status 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. *See* 8 C.F.R. § 245a.2(d)(5).

Although the regulations provide an illustrative list of contemporaneous documents that an applicant may submit, the list also permits the submission of affidavits and any other relevant document. *See* 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.

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 (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 regulation at 8 C.F.R. § 245a.2(d)(3)(i) states that letters from employers attesting to an applicant's employment must: provide the applicant's address at the time of employment; identify the exact period of employment; show periods of layoff; state the applicant's duties; declare whether the information was taken from company records; and identify the location of such company records and state whether such records are accessible or in the alternative state the reason why such records are unavailable.

The issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that he continuously resided in the United States in an unlawful status during the requisite period. Here, the applicant has failed to meet this burden.

On his application, the applicant listed two absences from the United States; June 1987 to July 1987 and during November 1992.

At the time of his interview, the applicant indicated that he had a child born in India in 1988. On his Form I-485 application filed under the LIFE Act, the applicant listed his child's date of birth as December 26, 1988.

Along with his Form I-687 applications filed in 1990 and 2005, the applicant provided the following evidence in an attempt to establish continuous unlawful residence since before January 1, 1982, through May 4, 1988:

- An affidavit from in New York City attesting to the applicant's employment as a stock boy from August 1985 to September 1988. The affiant's signature is indecipherable.
- Affidavits from [redacted] of Delano, California, who indicated that he met the applicant in 1981 and attested to the applicant's residences and employment in

California and New York since September 1981. The affiant based his knowledge on "meeting each other on a regular basis, and I have also visited him at his residences and I also speak to him on the telephone in California and New York."

- An affidavit from [redacted] of Bayside, New York, who attested to the applicant's residence at [redacted], Corona, New York from January 1986 to February 1990. The affiant asserted that he and the applicant regularly visited each other's homes and he has been in contact with the applicant since that time.
- An affidavit from [redacted] of Jackson Heights, New York, who attested to the applicant's California and New York residences since June 1982. The affiant asserted that he and the applicant regularly visited each other's homes.
- An affidavit from [redacted] of Elmhurst, New York, who indicated that he has personally known the applicant since September 1981 and attested to the applicant's California and New York residences since that time. The affiant asserted that he and the applicant regularly visited each other's homes.

On February 8, 2006, the director issued a Notice of Intent to Deny, which advised the applicant that it appeared he was in India in 1988 as he had a child born in India on December 26, 1988 and, therefore, it contradicts his claim to have been only absent in 1987 and 1992. The applicant was advised that the affidavits submitted did not contain sufficient objective evidence to which they could be compared to determine whether the attestations were credible, plausible, or internally consistent with the record; were not amenable to verification; and contained no evidence demonstrating that the affiants had direct personal knowledge of the events testified in their respective affidavits.

Counsel, in response, asserted that the applicant informed his office that at the time his initial Form I-687 application was filed in 1990, the individual who prepared his application failed to mention his trip to India in March to April 1988. Counsel asserted that the applicant departed the United States on March 20, 1988 and returned on April 15, 1988. Counsel submitted an affidavit from the applicant, who asserted, in pertinent part:

> That I did not mention my second visit of 1988 because for the first time when I filed my application in 1990, the person who typed my application made the typographical mistake. He did not mentioned about my absence from the United States in 1988. After that I did not mention in my recent applications as I was scared that it will mess up my case. At the time of my interview also, I was scared that if I would tell the truth about my visit in 1988, the INS will may arrest me or deport me. That's why I hide the truth from INS.

Counsel also submitted an affidavit from the applicant's brother, [redacted] who indicated that he has been residing in the United States since 1985. The affiant attested to the applicant's residence in the United States since 1981 and to his absences in 1987 and 1988.

The director, in considering the applicant's statement, determined that he was making an overt attempt to change certain events and circumstances after the fact in an apparent effort to explain

away many of the inconsistencies and questionable evidence uncovered during the review of his application and noted in the Notice of Intent to Deny.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

USCIS has determined that affidavits from third party individuals may be considered as evidence of continuous residence. *See Matter of E-- M--, supra.* In ascertaining the evidentiary weight of such affidavits, USCIS must determine the basis for the affiant's knowledge of the information to which he is attesting; and whether the statement is plausible, credible, and consistent both internally and with the other evidence of record. *Id.*

Following the dicta set forth in *Matter of E-- M--, supra*, the affidavits would not necessarily be fatal to the applicant's claim, if the affidavits upon which the claim relies are consistent both internally and with the other evidence of record, plausible, credible, and if the affiant sets forth the basis of his knowledge for the testimony provided. The statements issued by the applicant and counsel have been considered. However, the AAO does not view the documents discussed above as substantive enough to support a finding that the applicant entered the United States prior to January 1, 1982, and resided since that date through May 4, 1988.

At item 33 of his current Form I-687 application, the applicant indicated that he worked odd jobs during the requisite period. There is no mention of the employment from [redacted] and at [redacted] that was claimed on his initial Form I-687 application, and no explanation has been provided why the applicant amended his employment claim.

Nevertheless, the employment letter from [redacted] provided with his initial Form I-687 application failed to include the applicant's address at the time of employment as required under 8 C.F.R. § 245a.2(d)(3)(i). Under the same regulations, the letter also failed to declare whether the information was taken from company records, and identify the location of such company records and state whether such records are accessible or in the alternative state the reason why such records are unavailable. Furthermore, the signature on the employment letter is indecipherable, thereby giving rise to questions regarding whether the signature is that of a person who was authorized and affiliated with the entity.

[redacted] cannot attest to the applicant's residence in the United States prior to 1985, as he did not reside in the United States prior to that year.

The record reflects that an investigation was conducted in order to verify the authenticity of the applicant's birth certificate. During a field investigation trip to Punjab, India during September

1992, the local registrar of births and deaths at Faridkot, Punjab certified that the applicant's birth certificate was fraudulent.

Doubt cast on any aspect of an applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence. It is incumbent upon an 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 (BIA 1988).

The derogatory information establishes that the applicant made material misrepresentation in asserting his claim of residence in the United States for the period in question and thus casts doubt on his eligibility for temporary resident status under 245A of the Act. By engaging in such an action, the applicant has negated his own credibility, the credibility of his claim of continuous residence in this country for the requisite period, and the credibility of all documentation submitted in support of such claim.

Pursuant to 8 C.F.R. § 245a.(d)(5)(e), 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 submit sufficient credible documentation to meet his burden of proof in establishing that he has resided in the United States for the requisite period by a preponderance of the evidence as required under both 8 C.F.R. § 245a.12(e) and *Matter of E--M--, supra.*

An alien applying for adjustment of status has the burden of proving by a preponderance of evidence that he or she has continuously resided in an unlawful status in the United States from prior to January 1, 1982 through the date of filing, is admissible to the United States under the provisions of section 245A of the Act, 8 U.S.C. § 1255a, and is otherwise eligible for adjustment of status. 8 C.F.R. § 245a.2(d)(5). The applicant has failed to meet this burden. Therefore, the applicant is ineligible for temporary resident status under section 245A of the Act.

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