U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: NEW YORK Date: DEC 07 2009

MSC 06 017 11801

IN RE: Applicant: [redacted]

APPLICATION: Application for Temporary Resident Status under 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 Perry Rhew
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) on 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) on February 17, 2004 (CSS/Newman Settlement Agreements), was denied by the director in New York City. It is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The director denied the application on the ground that the applicant failed to establish that he was continuously resident in the United States in an unlawful status from before January 1, 1982 through the date of attempted filing during the original one-year application period for legalization that ended on May 4, 1988.

On appeal the applicant asserts that he has lived in the United States since 1981 and resubmits some documentation that was already in the record.

An applicant for temporary resident status under section 245A of the Immigration and Nationality Act (the Act) must establish his or her entry into the United States before January 1, 1982, and continuous residence in the United States in an unlawful status from before January 1, 1982 through the date the application is filed. *See* section 245A(a)(2) of the Act, 8 U.S.C. § 1255a(a)(2). The applicant must also establish his or her continuous physical presence in the United States since November 6, 1986. *See* 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. *See* 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 the regulation at 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 from May 5, 1987 to May 4, 1988. *See* 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. *See* 8 C.F.R. § 245a.2(d)(5).

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.

The regulations provide an illustrative list of documents – which includes affidavits and "any other relevant document" – that the applicant may submit as evidence of continuous residence in the United States during the requisite period under section 245A of the Act. *See* 8 C.F.R. § 245a.2(d0)(3)(vi)(L).

The applicant, a native of Peru who claims to have lived in the United States since September 3, 1981, filed his application for temporary resident status under section 245A of the Act (Form I-687), together with a Form I-687 Supplement, CSS/Newman (LULAC) Class Membership Worksheet, on October 17, 2005.

On March 14, 2006, the director issued a Notice of Intent to Deny (NOID), indicating that the evidence of record was insufficient to demonstrate the applicant's residence in the United States during the years 1981 to 1984. The director referred to several envelopes in the record with postmark dates from those years, but stated that their authenticity could not be determined. The applicant was granted 30 days to provide additional evidence, and did so by submitting further documentation on April 6, 2006.

On September 20, 2007, the director issued a Notice of Decision denying the application. The director ruled that the applicant's response to the NOID was not sufficient to overcome the grounds for denial. The director discussed the affidavits from individuals who claim to have known the applicant in the United States during the 1980s, noting numerous inconsistencies, the overall lack of information provided by the affiants, and the absence of corroborating documentation for the years 1981 to 1984. As for the postmarked envelopes in the record, the director declared that they had little evidentiary weight.

The applicant submitted a timely appeal, reiterating his claim to have resided continuously in the United States since 1981 and resubmitting some affidavits and related evidence already in the record.

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).

The record includes a series of original pay statements and Form W-2, Wage and Tax Statements, from the years 1985 to 1988 and beyond. The record also includes a Receipt for Registered Mail, postmarked in Brooklyn, New York on June 7, 1984, identifying the applicant (address in Brooklyn) as the sender of mail to Peru. Based on the foregoing evidence, the AAO concludes that the applicant has established his continuous residence in the United States from 1984 onward.

The issue on appeal, therefore, is whether the applicant has submitted sufficient and credible evidence of his continuous residence in the United States during the years 1981 to 1983. The AAO determines that he has not.

The AAO agrees with the director that the affidavits in the record, submitted by various individuals who claim to have lived with, employed, or otherwise known the applicant in the United States during the 1980s are deficient in numerous respects. Some of the affiants indicate that they did not even meet the applicant until after 1984, and other affiants provided inconsistent and clearly unverifiable information. The affidavits are all minimalist and/or fill-in-the-blank documents with limited personal input by the affiants. Considering how long they claim to have known the applicant, it is remarkable how few details the affiants provide about the applicant's life in the United States and their interaction with him over the years. For the reasons discussed above, the AAO concludes that the affidavits have little probative value. They are not persuasive evidence that the applicant resided continuously in the United States during the years 1981-1983.

The only other evidence of the applicant's residence in the United States during the years 1981 to 1983 are the postmarked envelopes addressed to the applicant in Brooklyn, New York, from Callao, Peru. The record includes six originals and two photocopies – one with a postmark date of December 17, 1981, two others with postmark dates of April 6, 1982 and September 11, 1982, and the remainder with stamps and/or postmarks indicating that they date from 1984 and 1985. Only the first three envelopes, therefore, are relevant to the issue of whether the applicant resided in the United States during the years 1981-1983. Of these three envelopes, two appear problematical. On the envelope postmarked April 6, 1982, one of the two stamps – celebrating the centennial of the [redacted] – **was not issued until October 26, 1982.** *See* Scott 2009 Standard Postage Stamp Catalogue, Vol. 5, p. 195. Similarly, on the envelope postmarked September 11, 1982, one of the two stamps – commemorating the archaeologist [redacted] – was not issued until October 13, 1982. *See* Scott Catalogue (*id.*), Vol 5, p. 195.

Thus, the two envelopes bearing postmark dates in April and September 1982 have stamps affixed that were not in circulation until October of that year. It is incumbent upon an applicant to resolve any inconsistencies in the record by independent objective evidence. Attempts to

explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92, (BIA 1988). Doubt cast on any aspect of the applicant's evidence also reflects on the reliability of the applicant's remaining evidence. *See id.*

The applicant has provided no explanation for the evidentiary discrepancies involving the postmark dates and the stamp issuance dates discussed above. The AAO determines, therefore, that the envelopes bearing postmark dates in December 1981, April 1982, and September 1982 have little probative value. They are not persuasive evidence that the applicant resided in the United States during the years 1981 or 1982, much less during 1983.

Based on the foregoing analysis of the evidence, the AAO concludes that the applicant has not established that his continuous unlawful residence in the United States began before 1984. Therefore, the applicant has not established that he resided continuously in the United States in an unlawful status from before January 1, 1982 through the date he attempted to file a Form I-687 during the original one-year application period for legalization that ended on May 4, 1988. Accordingly, the applicant is ineligible for temporary resident status under section 245A(a)(2) of the Act.

The appeal will be dismissed, and the application denied.

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