PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

L1

[redacted]

FILE: [redacted] Office: COLUMBUS Date: FEB 25 2009
MSC-05-351-13369

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:

SELF-REPRESENTED

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, Columbus. The decision is now before the Administrative Appeals Office (AAO) on appeal. This matter will be remanded for a new interview and further action and consideration.

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 September 16, 2005 (together, the I-687 Application). 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, specifically noting that the evidence submitted is insufficient to overcome the grounds for denial. The director denied the application as 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, the applicant submitted a Form I-694 Notice of Appeal of Decision Under Section 210 or 245A, a statement, a letter from the [redacted], and affidavits already in the record of proceeding. On appeal, the applicant argues that he was not permitted the use of an interpreter during his interview and that not having an interpreter present during his interview was unfair and a violation of due process. The applicant also argues that the interview was not conducted in a professional manner. As of this date, the AAO has not received any additional evidence from the applicant. Therefore, the record is complete.

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 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).

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, and the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility. 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. *See* 8 C.F.R. § 245a.2(d)(6). The weight to be given any affidavit depends on the totality of the circumstances, and a number of factors must be considered. More weight will be given to an affidavit in which the affiant indicates personal knowledge of the applicant's whereabouts during the time period in question rather than a fill-in-the-blank affidavit that provides generic information. The regulations provide specific guidance on the sufficiency of documentation when proving residence through evidence of past employment or attestations by churches or other organizations. 8 C.F.R. §§ 245a.2(d)(3)(i) and (v).

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 demonstrate that he entered before 1982 and continuously resided in the United States for the requisite period.

The applicant has submitted affidavits; a letter; a copy of the applicant's passport; a copy of the applicant's employment authorization card issued on October 21, 2005; a copy of the applicant's

visitor's visa issue on August 31, 1998 in Lusaka; and a copy of the applicant's Form I-94 card stating that he entered the United States on September 6, 1998. The applicant's passport and employment authorization card are evidence of the applicant's identity, but do not demonstrate that he entered before January 1, 1982 and resided in the United States for the requisite period.

Some of the evidence submitted indicates that the applicant resided in the United States after May 4, 1988 and is not probative of residence before that date. The following applies to the requisite time period:

- A letter on [redacted] letterhead dated August 5, 1987 and signed by [redacted] The declarant states that the applicant "is a member of the muslim community" and has been "praying at the masjid since April 1983." Although the letter was written on [redacted] letterhead, the letter is not notarized. Furthermore, the letter fails to conform with regulatory guidelines in that it does not state the address where the applicant resided during the membership period, establish how the author knows the applicant, or state the origin of the information provided. *See* 8 C.F.R. § 245a.2(d)(3)(v). The AAO notes further that this affiliation was not included in the applicant's Form I-687 at part #31. Given these deficiencies, the letter has minimal probative value in supporting the applicant's claims that he entered the United States in 1981 and resided in the United States for the entire requisite period.

- A notarized affidavit from [redacted]. The affiant states that he has personal knowledge that the applicant resided in the United States. The affiant provides two addresses for the applicant in New York. However, the affiant provides dates for those addresses that are inconsistent with the information provided by the applicant on the Form I-687. The affiant states that that applicant lived at one address from "11/1981 to 12/1981" and at the second address from "12/1981 to 12/1981." 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. It is incumbent upon the 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The affiant states that he first met the applicant in November 1981 at [redacted]. The affiant also states that he and the applicant rode the train number [redacted] to [redacted] and have been good friends ever since that day. Although the affiant states that he has known the applicant since 1981, the statement does not supply enough details to lend credibility to a 24-year relationship with the applicant. For instance, the affiant does not indicate how he dates his initial meeting with the applicant or how frequently he had contact with the applicant. Given these deficiencies, this affidavit has minimal probative value in supporting the applicant's claims that he entered the United States prior to January 1, 1982 and resided in the United States for the entire requisite period.

- A notarized affidavit from The affiant states that he has personal knowledge that the applicant resided in the United States. The affiant provides two addresses for the applicant in New York. However, the affiant provides dates for those addresses that are inconsistent with the information provided by the applicant on the Form I-687. The affiant states that that applicant lived at one address from "11/1981 to 12/1981" and at the second address from "12/1981 to 12/1981." 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. It is incumbent upon the 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The affiant states that he first met the applicant at Yankee Stadium in 1981. The affiant also states that he and the applicant are Yankee fans and like "the sport." Although the affiant states that he has known the applicant since 1981, the statement does not supply enough details to lend credibility to a 24-year relationship with the applicant. For instance, the affiant does not indicate how he dates his initial meeting with the applicant or how frequently he had contact with the applicant. Given these deficiencies, this affidavit has minimal probative value in supporting the applicant's claims that he entered the United States prior to January 1, 1982 and resided in the United States for the entire requisite period.

The remaining evidence in the record is comprised of the applicant's statements and application forms, in which he claims to have entered the United States in July 1981 by boat. The applicant has not submitted any additional evidence in support of his claim that he was physically present or had continuous residence in the United States during the entire requisite period or that he entered the United States in 1981.

The director issued a notice of intent to deny (NOID) on November 17, 2005. The director denied the application for temporary residence on September 29, 2006. In denying the application, the director found that the applicant failed to establish that he entered the United States prior to January 1, 1982 or that he met the necessary residency or continuous physical presence requirements. Thus, the director determined that the applicant failed to meet his burden of proof by a preponderance of the evidence.

On appeal, the applicant argues that he was not permitted the use of an interpreter during his interview and that not having an interpreter present during his interview was unfair and a violation of due process. The AAO viewed the applicant's interview on videotape. During the beginning of the interview the applicant had an interpreter present. The videotape begins at

1:35:01 and runs until 1:51:19 with the interpreter present. The videotape is then edited and begins at 1:53:03 and runs through 2:27:04 without the interpreter present. Neither the record of proceeding nor the videotape provide an explanation as to why the interpreter is no longer present or why almost two minutes are missing from the videotape. Given that the record of proceeding does not address why the applicant's interpreter was not permitted during the entire interview and the videotape shows that the interpreter was not present for the entire interview, the AAO agrees that the applicant was not afforded a fair interview.[2]

The applicant also argues that the interview was not conducted in a professional manner. The AAO agrees that all applicants should be treated in a courteous and professional manner during U.S. Citizenship & Immigration Services interviews.

ORDER: This matter is remanded for a new interview and further action and consideration pursuant to the above.

[2] Section 15.7 of the redacted public version of the Adjudicator's Field Manual states that "if the person being questioned exhibits difficulty in speaking and understanding English, arrangements should be made for use of an interpreter even though the person may be willing to proceed without an interpreter. Any doubt should be resolved in favor of the use of an interpreter."