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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-05-305-11386

Office: ATLANTA

Date:

JAN 26 2009

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:

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, Atlanta and 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 Act, and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet. The director denied the application after determining that the applicant had not established by a preponderance of the evidence that he had continuously resided in the United States for the duration of the requisite period. The director noted that the applicant had failed to respond to the Notice of Intent to Deny (NOID) sent to him on November 6, 2006 and that the evidence contained in the record was not credible or verifiable; and therefore, insufficient to establish the applicant's eligibility for the immigration benefit sought. 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, counsel asserts that the appeal should not have been sent to the AAO because the denial involved a determination of Class Membership; and therefore, the matter should have been appealed to a Special Master. The director's instruction for the applicant to appeal the decision to the AAO is not in error. Pursuant to 8 C.F.R. § 245a.2(p), the AAO has jurisdiction over the denial of an Application for Temporary Resident Status under section 245A of the Act. Here, the application was denied based on the applicant's failure to establish his continuous unlawful residence in the United States since before January 1, 1982, and throughout the requisite period. The director treated the applicant as a class member by adjudicating the Form I-687 application. Consequently, the AAO does have jurisdiction to adjudicate the appeal and will adjudicate the applicant's appeal as it relates to his admissibility and his claim of continuous unlawful residence in the United States since prior to January 1, 1982. Counsel also asserts that he responded to the Director's NOID on November 20, 2006. Contrary to counsel's assertion, there is nothing in the record of proceeding to show that the applicant responded to the director's NOID dated November 6, 2006. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel further asserts on appeal that the director erred in failing to consider all of the evidence in the record, taking into consideration the passage of time and difficulties in obtaining documentation to support the applicant's claimed residency. He also asserts that there is no guideline in the Settlement Agreement in which to determine what is meant by credibility. The applicant did not submit any evidence on appeal.

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 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. *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 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).

An alien shall be regarded as having resided continuously in the United States if at the time of filing an application for temporary resident status, no single absence from the United States has exceeded forty-five (45) days, and the aggregate of all absences has not exceeded one hundred and eighty (180) days between January 1, 1982, through the date the application is filed, unless the alien can establish that due to emergent reasons the return to the United States could not be accomplished within the time period allowed, the alien was maintaining residence in the United States, and the departure was not based on an order of deportation. 8 C.F.R. § 245a.15(c)(1).

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 applicant submitted the following affidavits:

- An affidavit dated August 30, 1990 from [REDACTED] in which he stated that he has known the applicant to be present in the United States since December 1981. He further stated that he knew the applicant in India and that when the applicant first came to the United States in December 1981, he stayed with family friends, and that he has been living with the affiant from November of 1983 to July of 1990. The affiant lists his address as [REDACTED] in Whittier, California. The affiant’s statements are inconsistent with what his wife, [REDACTED] stated in her affidavit noted below and in what [REDACTED] stated in his letter of employment concerning the applicant’s presence in the United States. There has been no explanation given for these inconsistencies. It is also inconsistent with the copy of the lease agreement submitted by the applicant that shows he entered into a lease agreement in January of 1981 for premises located at [REDACTED]
- An affidavit dated July 19, 1990 from [REDACTED] in which she stated that she has known the applicant since 1960 in India. The affiant further stated that the applicant lived with one of her husband’s friends when he initially came to the United States in January of 1981, and that from November of 1983 the applicant was living with her and her husband. The affiant’s statements are inconsistent with what her husband, [REDACTED] stated in his affidavit noted above where he stated that the applicant has been present in the United States since December of 1981. It is noted that the applicant submitted a copy of a lease agreement for the premises at [REDACTED] that does not contain the affiant’s or her husband’s name. It is further noted at clause #5 of this lease agreement, it is stated “Lessee shall not sub-let the demised premises”
- A letter from the [REDACTED] secretary in which he stated that the applicant has been a member in good standing of the club since

November 1984. A letter dated December 21, 2003 from the [REDACTED] of U.S.A. stating that the applicant has been an active member of the [REDACTED] Community for the last 25 years. The declarant also stated that the applicant has been involved in many of the gatherings and has served as the organization's treasurer. Here, the statements are inconsistent with what the applicant stated on his current and previous Forms I-687 application at part #31 and part #34, respectively, where he failed to list any affiliations or associations with the social club or community center during the requisite period. These inconsistencies call into question the credibility of the declarants' statements. In addition, the declarations do not conform to regulatory standards for attestations by organizations or churches. Specifically, the declarations do not show inclusive dates of membership nor do they establish the origin of the information being attested to. The declarants fails to specify the applicant's place of residency during the period of membership, 8 C.F.R. § 245a.2(d)(3)(v).

- Three declarations dated May 11, 1988 from [REDACTED] in which he stated that: (1) the company employed the applicant as a food preparer from December 18, 1981 to May 11, 1988; (2) that the applicant was employed by his company from February 18, 1981 to May 11, 1988; and (3) that the company employed the applicant as a cashier from February 18, 1981 to May 11, 1988. Here, the declarations contradict each other and are inconsistent with what the applicant stated on his current Form I-687 at part #33, where he lists his first period of employment in the United States from November of 1990 to March of 1992. Declaration (1) is inconsistent in that the applicant stated on his previously submitted Form I-687 at part #36 that he was employed by the company since February of 1981. In addition, the declarations do not conform to regulatory standards for attestations by employers. Specifically, the declarant does not specify the address(es) where the applicant resided during the claimed employment periods, nor does he indicate whether the employment information was taken from company records. Neither has the availability of the company records for inspection been clarified. 8 C.F.R. § 245a.2(d)(3)(i).
- Two declarations dated July 20, 1990 from [REDACTED] in which he stated that his company employed the applicant from May 12, 1988 to July 10, 1990; and that his last pay rate was \$5.00 per hour and \$6.00 per hour, respectively. The declarations are in conflict with each other, are inconsistent with statements made by the applicant, and do not conform to regulatory standards.
- A copy of a fill-in-the-blank lease agreement signed by [REDACTED] in which is stated that the applicant would lease the premises known as [REDACTED] in Whittier, California from month to month commencing January 20, 1981. A copy of a fill-in-the-blank lease agreement signed by [REDACTED] and the applicant in which it is stated that the applicant would lease the premises known as [REDACTED] in Whittier, California from month to month commencing November 1, 1983. The

applicant has failed to submit independent documentation such as rent receipts or cancelled checks to substantiate the information contained in the lease agreements.

- A copy of a letter from the office manager of [REDACTED] in which it is stated that the applicant has been a patient since 1985 for capping his teeth and regular dental checkups. Here, the declarant fails to submit independent documentary evidence such as copies of dental or payment records to support the statements made.

The record of proceeding shows that the applicant was interviewed by an immigration officer on July 23, 1990, at which time he stated under oath that he was absent from the United States in 1983 and 1987, only. He also stated during the interview that his wife had never been in the United States. The record contains copies of the applicant's children's birth certificates that show that his daughter was born in India on June 4, 1982, and that his son was born in India on July 9, 1985. The applicant also listed his children's dates of birth and place of birth on his Form I-485 Application to Register Permanent Resident or Adjustment of Status dated May 24, 2002. At part #32 of the applicant's current Form I-687 and at part #35 of the applicant's previously submitted Form I-687 application he stated that he was absent from the United States from October 5, 1983 to November 1, 1983 when he went to India as a result of his father's death, and from June 27, 1987 to August 10, 1987 when he went to visit his sick wife. The applicant has failed to address his apparent absences from the United States that resulted in his fathering his children. The applicant signed under penalty of perjury and also stated under oath during an interview with an immigration officer on September 16, 2003 that he was absent from the United States from 1985 to July of 1987, 18 months in India. There has been no explanation given for these inconsistencies.

In denying the application the director noted that the affidavits submitted were not credible or amenable to verification.

On appeal, the applicant reasserts his claim of eligibility for temporary residence status. The applicant does not submit any additional evidence.

It is noted that the applicant's application for class membership was denied by USCIS on January 21, 1997 due to lack of prosecution on the part of the applicant. It is also noted that the applicant's Form I-485 was denied by the USCIS on June 18, 2004 because he failed to provide sufficient credible evidence of continuous unlawful residence and continuous physical presence in the United States throughout the requisite periods.

In the instant case, the applicant has failed to provide sufficient, probative evidence to establish his continuous unlawful residence in the United States since prior to January 1, 1982, and throughout the requisite period. He has failed to overcome the issues raised by the director. There is insufficient evidence in the record of proceeding to demonstrate the reliability of the attestations submitted. The applicant has failed to provide an explanation for the multiple inconsistencies and contradictions found in the record. Doubt cast on any aspect of the

applicant's proof may 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 lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

The absence of sufficiently detailed documentation to corroborate the applicant's claim of continuous residence for the entire requisite period, and the inconsistencies in the evidence discussed above seriously detracts from the credibility of this 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 amenability to verification. Given the applicant's reliance upon documents that are contradictory and are inconsistent with his statements made under oath and on his Form I-687 applications, it is concluded that he has failed to establish continuous residence in an unlawful status in the United States for the requisite period 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.

According to an FBI report based upon the applicant's fingerprints, he was arrested on August 17, 2000 and charged with a peeping Tom violation. No further information is in the record regarding the final disposition of this charge.

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