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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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U.S. Citizenship and Immigration Services

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FILE: [Redacted]  
MSC 05 195 11601

Office: NEW YORK

Date: **JUL 10 2009**

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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. If your appeal was sustained, or if the matter was remanded for further action, you will be contacted. If your appeal was dismissed, 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.

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 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. 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. 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, the applicant asserts that he has submitted sufficient evidence to establish his continuous residence in the United States 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 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 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 including affidavits 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.* 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.

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.

In an attempt to establish continuous unlawful residence in the United States since prior to January 1, 1982, the applicant submitted:

- An affidavit from [REDACTED] who indicated that she met the applicant in December 1981 as the applicant “used to drive a taxi and took me to work.” The affiant indicated that in 1982, the applicant invited her to his home for a birthday celebration; in 1983, the applicant spent Thanksgiving at her home; on April 25, 1984, the applicant attended her surprise party; after not seeing the applicant for some time, the affiant saw the applicant on Valentine’s Day in 1986; on July 20, 1986, she was invited by the applicant to Flushing Meadow Park to attend the celebration of Columbia’s Independence Day; and in 1987, she and the applicant went to view the Christmas tree at Rockefeller Center.
- An affidavit from [REDACTED], who indicated that the applicant was in his employ as a painter from 1982 to 1988.

On February 6, 2007, the director issued a Notice of Intent to Deny, which advised the applicant 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. The applicant was also advised of inconsistencies between his oral testimony and his application. Specifically, 1) the applicant indicated that he resided in New York City at [REDACTED] for three years until 1984; however, the applicant claimed on his Form I-687 application to have resided at this address through 1988; 2) the applicant also indicated that he resided in Sunnyside, New York at [REDACTED] for one year in 1985; however, this address was not listed on the applicant's Form I-687 application; and 3) the applicant indicated that he did not depart from the United States during the requisite period; however, the applicant claimed on his Form I-687 application an absence in February 1987. The director determined that these contradictions cast doubt upon the veracity of the applicant's claim of residency during the requisite period.

The applicant was given 30 days in which to submit a rebuttal. The notice was sent to counsel and the applicant at their addresses of record. The notice to the applicant was returned by the post office as undeliverable and no response was received by counsel.

The director determined that the applicant had failed to submit sufficient credible evidence establishing her continuous residence in the United States since prior to January 1, 1982, and, therefore, denied the application on April 11, 2007.

On appeal, the applicant asserts that he resided at [REDACTED] from November 1981 to August 1988. The applicant asserts, "[t]here were other addresses applicant has a hard time remembering, but he was in the United States since 1981 – there is no contradiction about the statutory period."

The statements issued by the applicant have been considered. However, the AAO does not view the affidavits 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 the date he attempted to file his application, as he has presented contradictory and inconsistent documents, which undermines his credibility.

indicated that the applicant was in his employ as a painter from 1982 to 1988. However, the applicant did not claim the employment with [REDACTED] on his Form I-687 application. Assuming, arguendo, the applicant was employed by [REDACTED] the employment affidavit would have no probative value or evidentiary weight as the affidavit 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 affiant 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.

The affidavit from [REDACTED] cannot serve to establish the applicant's *continuous* residence during the requisite period as the affiant indicated that prior to seeing the applicant on Valentine's Day in

1986, she “hadn’t seen [the applicant] for a while” and that she did not know how to get a hold of him. In addition, the affiant indicated that she visited the applicant at his home in 1982, but failed to state the applicant’s place of residence.

The applicant claims to have been residing in the United States since 1981, but only provides affidavits from two affiants whose documents either lacked probative value or is contradictory in nature. The applicant claims to have resided in New York City at [REDACTED] during the requisite period, but provided no credible evidence such as lease agreements, rent receipts, utility bills or affidavits from affiants who knew of the applicant’s address of residence during the requisite period.

The absence of sufficiently detailed documentation to corroborate the applicant’s claim of continuous residence for the entire requisite period seriously detracts from the credibility of his 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 credibility issued arising from the affidavit from [REDACTED] and the applicant’s reliance upon the affidavit from [REDACTED] that has minimal probative value, it is concluded that the evidence submitted fails to establish continuous residence in an unlawful status in the United States during the requisite period.

Therefore, based upon the foregoing, the applicant has failed to establish by a preponderance of the evidence that he has continuously resided in an unlawful status in the United States for the requisite period as required 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.

Finally, the record contains a FBI report dated February 22, 2006, which reflects that the applicant was arrested under the alias [REDACTED] by the New York Police Department on March 20, 1992, for operating a motor vehicle with .10 percent or more alcohol, operating a motor vehicle while intoxicated and operating a motor vehicle without a license. The applicant was convicted of operating a motor vehicle while impaired by alcohol. However, without the actual court disposition, the AAO cannot find the applicant convicted of this misdemeanor offense.<sup>1</sup>

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<sup>1</sup> The instructions regarding the usage of the FBI report, and the provisions of 28 C.F.R. §50.12, state, in part, if the information on the record is used to disqualify an applicant, the official making the determination of suitability for licensing or employment shall provide the applicant the opportunity to complete, or challenge the accuracy of, the information contained in the FBI identification record. The deciding official should not deny the license or employment based on the information in the record until the applicant has been afforded a reasonable time to correct or complete the information, or has declined to do so.

The record also contains certified court documentation from the Queens County Criminal Court in New York City, which reflects:

1. The applicant was arrested under the alias [REDACTED] on July 8, 1995, for violating vehicle traffic laws 1192.3 and 600.1. On March 18, 1996, the applicant pled guilty to violating vehicle traffic law 1192.3, driving while intoxicated, a misdemeanor. The applicant was placed on probation for three years, ordered to pay a fine and attend a drunk driving program. [REDACTED]
2. The applicant was arrested on December 25, 1998, for violating penal laws 120.00(1); 260.10(a). 120.15 and 240.26(1). On June 3, 1999, the applicant pled guilty to violating penal law 240.26(1), harassment in the 2<sup>nd</sup> degree, a violation. [REDACTED]

The fact that New York's legal taxonomy classifies the applicant's offense in number two as a "violation" rather than a "crime," and precludes the offense from giving rise to any criminal disabilities in New York, is simply not relevant to the question of whether the offense qualifies as a "misdemeanor" for immigration purposes. For immigration purposes, a misdemeanor is any offense that is punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any. 8 C.F.R. § 245a.1(o). It is also noted that offenses that are punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. In this case, New York law provides that a violation of harassment in the 2<sup>nd</sup> degree is punishable by up to fifteen days incarceration. Therefore, we conclude that the applicant's conviction in number two above qualifies as a "misdemeanor" as defined for immigration purposes in 8 C.F.R. § 245a.1(o).

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