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] Office: NEW YORK Date: JUN 05 2009

MSC-06-031-15644

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:

[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, or *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 of the New York office, 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 (LULAC) Class Membership Worksheet. The director denied the application, finding 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 time period.

On appeal, counsel for the applicant asserts that the applicant has 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 time period. The applicant has submitted additional evidence on appeal. The AAO has considered the applicant's assertions, reviewed all of the evidence, and has made a *de novo* decision based on the record and the AAO's assessment of the credibility, relevance and probative value of the evidence.[1]

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

[1] 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 long been recognized by the federal courts. *See, e.g. Dor v. INS,* 891 F.2d 997, 1002 n.9 (2d Cir. 1989).

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. 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. *Matter of Ho,* 19 I & N Dec. 582, 591-592 (BIA).

The issue in this proceeding is whether the applicant (1) entered the United States before January 1, 1982 and (2) has continuously resided in the United States in an unlawful status for the requisite period of time. The documentation that the applicant submits in support of his claim to have arrived in the United States before January 1982 and lived in an unlawful status during the requisite period consists of several affidavits of relationship and copies of photographs. The AAO has reviewed each document in its entirety to determine the applicant's eligibility; however, the AAO will not quote each witness statement in this decision. Some of the evidence submitted indicates that the applicant

resided in the United States after May 4, 1988; however, because evidence of residence after May 4, 1988 is not probative of residence during the requisite time period, it shall not be discussed.

The applicant submitted two affidavits from [redacted] The affiant says that he first met the applicant in 1980 in New York when the applicant was looking at a sub-rental notice that the affiant had posted on a neighborhood light post. The affiant states that the applicant subleased an apartment from him for $100.00 per month at [redacted] in New York from May 1980 for the duration of the requisite statutory period. The affiant also states that he knows that the applicant left the United States for a few months in 1982.

The record contains two affidavits from [redacted] One of the affidavits of affiant [redacted] is almost identical to one of the affidavits of affiant [redacted] The affiant states that he has known the applicant since 1980 when he met him in a coffee shop in New York. The affiant states that the applicant lived at [redacted] in New York from May 1980 for the duration of the requisite statutory period, and that he visited the applicant there many times.

The record contains two affidavits from [redacted]. One of the affidavits of affiant [redacted] is almost identical to affidavits submitted by affiants [redacted] and [redacted]. In one of her affidavits, affiant [redacted] states that she first came to the United States in 1981 and that she saw the applicant, with whom she was already acquainted from Hong Kong, in New York in 1983. In the other affidavit affiant [redacted] states that she first came to the United States in 1983 and first met the applicant several weeks after arriving in the United States. The affiant also states that the applicant lived at [redacted] in New York from May 1980 for the duration of the requisite statutory period, and that she visited the applicant there on numerous occasions. Due to the unexplained inconsistencies contained in these affidavits, the statements of affiant [redacted] have minimal probative value.

The applicant has also submitted the affidavit of [redacted], whose affidavit is almost identical to affidavits submitted by the other affiants. [redacted] states that the applicant lived with her for two weeks when he first arrived in the United States, before living at [redacted] in New York from May 1980 for the duration of the requisite statutory period. At the time of his interview on the instant application the applicant stated that when he first entered the United States in May 1980 he lived at his cousin's wife's house at [redacted] in Brooklyn, New York. This is the residence address listed by the affiant.[2] However, the applicant does not list this address as a residence on the instant application. Due to this inconsistency, this affidavit has minimal probative value.

Although the witnesses claim to have personal knowledge of the applicant's residence in the United States during the requisite period, none of the witness statements provides concrete information, specific to the applicant and generated by the asserted associations with him, which would reflect and corroborate the extent of those associations, and demonstrate that they were a sufficient basis for reliable knowledge about the applicant's residence in the United States during the requisite period. For instance, the witnesses do not state how they date their initial meeting with the applicant, how frequently they had contact with the applicant, and how they had personal knowledge of the

[2] Although in her statement the affiant states that she has known the applicant his entire life, the affiant does not state that she is the wife of the applicant's cousin.

applicant's presence in the United States during the requisite period. 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. Upon review, the AAO finds that, individually and together, the witness statements do not indicate that their assertions are probably true.

The remaining evidence in the record is comprised of copies of four photographs, the applicant's statements, and the instant Form I-687. The applicant has submitted copies of four photographs. The persons in the photographs have not been identified by name and three of the photographs are undated. The fourth photograph is dated August 20, 1987. Although the one photograph is evidence in support of the applicant's presence in the United States on August 20, 1987, these copies of photographs do not establish the applicant's continuous residence for the duration of the requisite period.

The AAO finds in its *de novo* review that the record of proceedings contains materially inconsistent statements from the applicant regarding his entry into the United States and residences during the requisite statutory period. At the time of the applicant's interview on the instant application the applicant stated that he first entered the United States in May 1980.[3] However, the record of proceedings contains an Optional Form 221, two-way visa action request and response form, containing information provided by the applicant in 1995 by which the applicant obtained a nonimmigrant visa. This form requests the applicant to state the date of any prior visit to the United States and the applicant stated that he had no prior visit to the United States. These contradictions in the applicant's testimony are material to his claim in that they have a direct bearing on the applicant's residence in the United States for the duration of the requisite period. As stated above, 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. *Matter of Ho, supra.* The contradictions undermine the credibility of the applicant's claim of entry into the United States prior to January 1, 1982 and continuous residence in the United States during the requisite period.

As stated previously, 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 the evidence produced by the applicant will be judged according to its probative value and credibility. 8 C.F.R. § 245a.2(d)(6). Here, the applicant has failed to provide probative and credible evidence of his continuous residence in the United States for the duration of the requisite period. The applicant's evidence lacks sufficient detail, and there are material inconsistencies in the record.

Upon a *de novo* review of all of the evidence in the record, the AAO agrees with the director that the evidence submitted by the applicant has not established that he is eligible for the benefit sought. The various statements and affidavits currently in the record which attempt to substantiate the applicant's residence in the United States during the statutory period are not objective, independent evidence such that they might overcome the inconsistencies in the record regarding the applicant's claim that he maintained continuous residence in the United States throughout the statutory period, and thus are not probative.

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[3] At the time of his interview, the applicant also stated that he was absent from the United States from some time in February 1982 until his reentry some time in April 1982.

Therefore, based upon the foregoing, the applicant has failed to establish by a preponderance of the evidence that he entered the United States before January 1, 1982 and 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.

The AAO notes that on January 4, 2000 the applicant was charged with one count of violating section 120.14 of the New York Penal Code (PC), *Menacing in the Second Degree,* one count of violating PC § 120.00, *Assault in the Third Degree,* and one count of violating PC § 240.26, *Harassment in the Second Degree.* On February 2, 2001 the court dismissed the charges against the applicant and sealed the record. (Criminal Court of the City of New York, County of Kings, [redacted]

The AAO also notes that in 1995, when the applicant applied for a nonimmigrant visa, the applicant also applied for a waiver of inadmissibility for misrepresenting his marital status and place of birth in a 1979 visa application.[4] Although this ground of inadmissibility is waivable, even if the applicant were to be granted a waiver he remains ineligible for failure to establish his continuous unlawful residence.

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

[4] The applicant's 1979 request for a nonimmigrant visa was refused. The applicant's 1995 request for a waiver was granted on humanitarian grounds and a nonimmigrant visa was issued.