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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[redacted]

FILE: [redacted] Office: NEW YORK Date: JUN 17 2009

MSC 06 067 12028

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.

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) 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 submits some additional documentation.

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.

An applicant for temporary resident status has the burden to establish 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 an 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 Bangladesh who claims to have lived in the United States since August 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 December 6, 2005. At that time the applicant submitted the following evidence of his residence in the United States during the 1980s:

An affidavit by [redacted] a resident of Brooklyn, New York, dated October 15, 2005, stating that the applicant lived with him at [redacted] in Brooklyn during the years 1981 to 1987.

- An affidavit by [redacted] a resident of Brooklyn, New York, dated November 21, 2005, stating that the applicant lived with him at [redacted] in Brooklyn during the years 1986 to 1991.

On February 5, 2007 the director issued a Notice of Intent to Deny (NOID), indicating that the affidavit evidence was insufficient to establish the applicant's continuous unlawful residence in the United States during the years 1981 to 1988. The applicant was granted 30 days to submit additional evidence.

In response to the NOID the applicant submitted the following additional evidence of his residence in the United States during the 1980s:

- An affidavit by president of S & S Construction, dated September 28, 2006, stating that the applicant worked for him part-time as a handyman from 1983 to 1985.

An affidavit by a resident of Brooklyn, New York, dated October 6, 2006, stating that he met the applicant in 1985 and knows that he has resided in the United States since 1981.

An affidavit by [redacted] a resident of Brooklyn, New York, dated October 11, 2006, stating that he met the applicant in 1986 and knows that he has resided in the United States since 1981.

On May 7, 2007, the director issued a decision denying the application. The director determined that the evidence submitted in response to the NOID was insufficient to overcome the grounds for denial, and concluded that the applicant had failed to establish his continuous residence in the United States during the requisite period to qualify for temporary resident status under the Act.

On appeal the applicant submits two additional documents, neither of which dates from or pertains to the years 1981 to 1988 – the time period over which the applicant must establish his continuous unlawful residence in the United States to be eligible for temporary resident status under the Act.

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 issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate 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. The AAO determines that he has not.

The applicant has no contemporary documentation from the 1980s demonstrating that he resided in the United States during the years 1981-1988. For someone claiming to have lived and worked in this country continuously since 1981, it is remarkable that he is unable to produce a solitary document dating from that decade.

The affidavits by [redacted] and dated in 2005, indicating that the applicant lived with them over the ten-year period from 1981 to 1991, have minimalist formats with little personal input by the affiants. Considering how long each of the affiants claims to have lived with the applicant, it is remarkable how little information they divulge. Neither affidavit provides any details about the applicant's life in the United States, such as where he worked during the 1980s, or the nature and extent of the applicant's interaction with the affiants over the years. Nor are the affidavits accompanied by any documentary evidence – such as photographs,

letters, and the like – of the applicant's personal relationship with the affiants in the United States during the 1980s. In view of these substantive shortcomings, the AAO finds that the affidavits have little probative value. They are not persuasive evidence of the applicant's continuous unlawful residence in the United States during the years 1981-1988.

The same substantive shortcomings apply to the affidavits in 2006 by [redacted] and [redacted] In addition, these two affiants did not even know the applicant before 1985 and 1986, respectively. Accordingly, they could not know from personal experience whether the applicant resided in the United States as far back as 1981. The AAO concludes, therefore, that these two affidavits have no probative value as evidence of the applicant's continuous unlawful residence in the United States during the years 1981-1988.

With respect to the final affidavit by [redacted] who claims to have employed the affiant as a handyman from 1983 to 1985, the regulation at 8 C.F.R. § 245a.2(d)((3)(i) states that letters from employers attesting to an applicant's employment must: provide the applicant's address at the time of employment; identify the exact period of employment; show periods of layoff; state the applicant's duties; 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 by [redacted] does not comport with these requirements because it did not identify the applicant's address at the time of employment; did not identify the exact period of employment and periods of layoff (stating only vaguely that the applicant worked on a part-time basis between 1983 and 1985); did not state the applicant's duties in detail (stating only vaguely that he was a "handyman"); and did not indicate whether the information about the applicant was taken from company records and whether such records are available for review. Due to the infirmities discussed above, the employment affidavit has little probative value as evidence of the applicant's continuous residence in the United States during the years 1983-1985.

Based on the foregoing analysis of the evidence, the AAO determines that the applicant has failed to establish 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.