

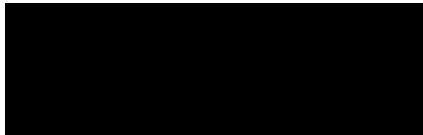
**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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**

PUBLIC COPY



L1

FILE:

[REDACTED]
MSC-04-307-11840

Office: NEW YORK

Date: OCT 14 2009

IN RE:

Applicant: [REDACTED]

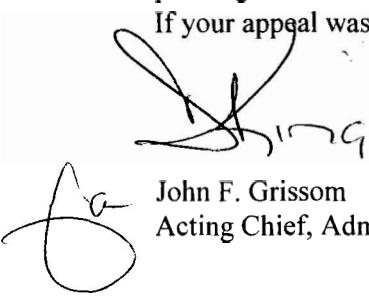
APPLICATION: Application for Temporary Resident Status under Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:



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 was ineligible for adjustment to temporary resident status because he 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 evidence which the applicant previously submitted establishes by a preponderance of the evidence that he 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)(1).

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.

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).

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).¹

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 has established that he (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 witness statements. 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 has submitted the affidavit of [REDACTED] who states that he has known the applicant since 1981. However, the affiant does not state where or how he met the applicant, nor does he state where he and the applicant were residing at that time.

The record contains the affidavit of [REDACTED] who states that he knew the applicant from Bangladesh, met the applicant in the United States in 1982, and has since enjoyed picnics and the movies with him. However, the affiant does not state where or how he met the applicant in the United States, nor does he state where he and the applicant were residing at that time.

The applicant has submitted the affidavit of [REDACTED] who states that he met the applicant in 1981 in New York. However, the affiant does not state where or how he met the applicant, nor does he state where he and the applicant were residing at that time. The affiant also states that the applicant applied for legalization between 1987 and 1988 but was front-desked due to travel outside of the United States, although the affiant does know state how he acquired this information.

The record contains the affidavit of [REDACTED] who states that the applicant resided at [REDACTED] in New York from December 1981 for the duration of the requisite statutory period, although the affiant does not state how he acquired this information.

The applicant has submitted the affidavit of an individual whose name appears to be Smalan, who states that on October 10, 1988 he accompanied the applicant to apply for legalization but the applicant was front-desked due to travel outside of the United States. However, the affiant does not state when, where or how he met the applicant, nor does he state where he and the applicant were residing at that time.

The applicant has submitted the affidavit of [REDACTED] who states that he has known the applicant since meeting him in New York in 1981. However, the affiant does not state where or how he met the applicant, nor does he state where he and the applicant were residing at that time.

The record contains the affidavit of [REDACTED], who states that has known the applicant since he met him in 1981 in Brooklyn at a community social function. However, the affiant does not state where in Brooklyn he met the applicant, nor does he state where he and the applicant were residing at that time.

The applicant has submitted the joint affidavit of two persons, whose names are illegible, who state that they are the secretary and the president, respectively, of the Baitul Mukarram Masjid and Islamic Center in Brooklyn. The affiants state that since 1983 the applicant has contributed greatly to the development of the center. However, the applicant failed to list any affiliation or association with the Brooklyn mosque or any other religious organization on the instant Form I-687 application.² At part 31 of the application where applicants are asked to list their involvement with any religious organizations, the applicant did not list any organizations. This is an inconsistency which is material to the applicant's claim in that it has 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*. This contradiction undermines 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.

More importantly, the affidavit does not meet the requirements set forth at 8 C.F.R. § 245a.2(d)(3)(v), which provides requirements for attestations made on behalf of an applicant by churches, unions, or other organizations. Attestations must: Identify applicant by name; (2) be signed by an official (whose title is shown); (3) show inclusive dates of membership (4) state the address where the applicant resided during membership period; (5) include the seal of the organization impressed on the letter or the letterhead of the organization, if the organization has letterhead stationery; (6) establish how the author knows the applicant; and (7) establish the origin of the information being attested to. This attestation fails to comply with the cited regulation. Therefore, this attestation is of little probative value.

The record contains the affidavit of [REDACTED] who states that he has known the applicant since 1982, although the affiant does not state where, when or how he met the applicant. In addition, the affiant states that he has personal knowledge that the applicant left the United States some time in September 1987 and returned some time in November 1987, although the affiant does not state how he acquired this knowledge.

The applicant has submitted a witness statement from [REDACTED], who states that he has known the applicant since some time before 1982, when he met him at a social party at the home of a Bangladeshi neighbor in Brooklyn. However, the witness does not state the name or the address of the neighbor, nor does the witness state where he and the applicant were living at that time.

The record contains a witness statement from [REDACTED] who states that she has known the applicant since 1983, although the witness does not state where, when or how she met the applicant, or where she and the applicant were residing at that time.

² The applicant's initial Form I-687, filed in 1988 to establish the applicant's CSS class membership, also does not list the applicant's association or affiliation with the Brooklyn mosque.

The applicant has submitted an employment verification letter from P.B.'s Diner-Restaurant, from a person whose names is illegible, stating that the applicant worked at the restaurant for the period of time from December 1, 1983 until at least the date of the letter on April 7, 1985. However, the testimony of the witness is inconsistent with the testimony of the applicant in the instant I-687, in which the applicant does not list employment with the restaurant during the requisite statutory period.

Although the witnesses claim to have personal knowledge of the applicant's residence in the United States during the requisite period, the witness statements do not provide 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. To be considered probative and credible, witness affidavits must do more than simply state that an affiant knows an applicant and that the applicant has lived in the United States for a specific time period. Their content must include sufficient detail from a claimed relationship to indicate that it probably did exist and that the witness, by virtue of that relationship, does have knowledge of the facts alleged. For instance the witnesses do not state how they date their initial meeting with the applicant or specify social gatherings, other special occasions or social events when they saw and communicated with the applicant during the requisite period. The affiants also do not state how frequently they had contact with the applicant during the requisite period. The affiants do not provide sufficient details that would lend credence to their claimed knowledge of the applicant's residence in the United States during the requisite period. For these reasons the AAO finds that the witness statements do not indicate that their assertions are probably true.

Furthermore, the employment verification letter from P.B.'s Diner-Restaurant fails to conform to the regulatory standards for letters from employers. The regulation at 8 C.F.R. § 245a.2(d)(3)(i) provides that letters from employers must include: (A) Alien's address at the time of employment; (B) Exact period of employment; (C) Periods of layoff; (D) Duties with the company; (E) Whether or not the information was taken from official company records; and (F) Where records are located and whether the Service may have access to the records. If the records are unavailable, an affidavit-form letter stating that the alien's employment records are unavailable and why such records are unavailable may be accepted in lieu of subsections (E) and (F). The employment verification letter fails to declare whether the information was taken from company records, to identify the location of such company records, and to state whether such records are accessible, or in the alternative state the reason why such records are unavailable. Further, the letter does not state how the witness was able to date the applicant's employment. It is unclear whether the witness referred to his or her own recollection or any records he or she or the company may have maintained. Lacking relevant information, the letter regarding the applicant's employment fails to provide sufficient detail to verify the applicant's claim of continuous residence in the United States for the duration of the requisite statutory period. Therefore, this document has minimal probative value.

The remaining evidence in the record is comprised of copies of the applicant's statements, the instant Form I-687, a Form I-485 application to adjust to permanent resident status under the Legal

Immigration Family Equity (LIFE) Act, and the applicant's initial Form I-687 application filed in 1990 to establish the applicant's CSS class membership.

The AAO finds in its *de novo* review that the record of proceedings contains materially inconsistent statements from the applicant regarding his initial date of entry into the United States during the requisite statutory period. At the time of his interview on the instant I-687 application and in written class member worksheets dated May 17, 1991 and July 28, 2004, respectively, the applicant stated that he first entered the United States on August 15, 1981. However, on May 21, 2003 the applicant filed a Form I-485 application to adjust to permanent resident status under the Legal Immigration Family Equity (LIFE) Act. The applicant filed with that application a Form G-325A, biographic information sheets, dated May 19, 2003. The Form G325A requests applicants to list their last address outside the United States of more than one year. On this form the applicant stated that he resided in Dhaka, Bangladesh from February 1958 until October 1981. This contradiction is material to the applicant's claim in that it has 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 and employment 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.

Beyond the decision of the director, the record contains evidence that the applicant has been absent from the United States for a period in excess of 45 days during the requisite statutory period, constituting a break in any continuous residence he may have established.

An applicant shall be regarded as having resided continuously in the United States if at the time the application for temporary resident status is filed no single absence from the United States has exceeded 45 days, and the aggregate of all absences has not exceeded 180 days during the requisite period, unless the applicant can establish that due to emergent reasons the return to the United States could not be accomplished within the time period allowed, the applicant was

maintaining a residence in the United States, and the departure was not based on an order of deportation. 8 C.F.R. § 245a.1(c)(1).

Continuous unlawful residence is broken if an absence from the United States is more than 45 days on any one trip unless return could not be accomplished due to an “emergent reason”. 8 C.F.R. § 245a.2(h)(1)(i). “Emergent reasons” has been defined as “coming unexpectedly into being.” *Matter of C*, 19 I&N Dec. 808 (Comm. 1988).

In this case, at the time of completing the instant I-687 application, at part 32 of the application, the applicant was asked to list his absences from the United States, and he listed one absence from the United States during the requisite period, from some time in September 1987 to some time in November 1987. In two class member worksheets, dated May 17, 1991 and July 28, 2004, respectively, the applicant stated that he was absent from the United States from September 21, 1987 to November 22, 1987, a period of at least 62 days, due to his mother being sick. Although the applicant has not produced copies of any passport with which he traveled during the requisite period, his testimony indicates that he had an absence from the United States of at least 62 days during the requisite period.

The applicant’s admitted absence from the United States from September 21, 1987 to November 22, 1987, a period of more than 45 days, is clearly a break in any period of continuous residence he may have established. Since the applicant has not provided any evidence that there was an “emergent reason” for his failure to return to the United States in a timely manner, he 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*. Therefore, the applicant is ineligible for temporary resident status under section 245A of the Act on this basis.

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.

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