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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

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: SAN FRANCISCO, CA Date: OCT 29 2009

MSC 05 238 13738

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 forwarded to the Citizenship and Immigration Services National Records 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 if the matter was remanded for further action, the record of proceedings was returned to the office that originally issued a decision in your case, and you will be contacted.

Perry Rhew, Chief
Administrative Appeals Office

DISCUSSION: The Director, San Francisco, California denied the Form I-687, Application for Status as a Temporary Resident Under Section 245A of the Immigration and Nationality Act, filed 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). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The AAO maintains plenary power to review this matter 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 federal courts have long recognized the AAO's *de novo* review authority. *See,* e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.[1]

At the outset, the AAO notes that the director made statements in the notice of decision which suggested that the applicant does not qualify for CSS/Newman class membership. The director also adjudicated the Form I-687, Application for Temporary Resident Status Under Section 245A of the Immigration and Nationality Act, on the merits of that request and instructed the applicant to appeal the decision to the AAO by filing a Form I-694, Notice of Appeal. Thus, rather than denying the request based on a denial of the Class Membership Application and notifying the applicant of his right to seek review by a Special Master, the director adjudicated the application on the merits. Thus, the AAO will treat the application as if the director has found that the applicant has established class membership.[2]

The director also noted that the applicant claimed to have entered the United States without inspection prior to January 1, 1982, and he suggested that the applicant needed to demonstrate that his unlawful status prior to 1982 was known to the government.

According to section 245A(a)(2) of the Immigration and Nationality Act (Act), if a legalization applicant entered the United States as a nonimmigrant before January 1, 1982, such applicant must establish that his period of authorized stay as a nonimmigrant expired before such date through the passage of time or that his unlawful status was known to the government as of such date. Yet, in this case, the applicant is not claiming to have been present in the United States in nonimmigrant status prior to 1982. Thus, whether or not the government was aware of his unlawful status prior to January 1, 1982 is not relevant in this proceeding. The AAO withdraws any suggestion made by the

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in this case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[2] This office does not have authority to review denials of CSS/Newman Class Membership Applications.

director in the November 30, 2006 notice of intent to deny or in the January 22, 2007 notice of decision that the applicant needs to establish that his unlawful status was known to the government prior to 1982.

On appeal, the applicant indicated that he is eligible to adjust to temporary resident status under the CSS/Newman Settlement Agreements.

Under the CSS/Newman Settlement Agreements, USCIS shall adjudicate each Form I-687 under the provisions of section 245A of the Act, regulations and administrative and judicial precedents which the INS, now USCIS, followed in adjudicating the Forms I-687 timely filed during the Immigration Reform and Control Act of 1986 (IRCA) application period. *See* CSS/Newman Settlement Agreements.

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 245(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)(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 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 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 regulation at 8 C.F.R. § 245a.2(b) provides in pertinent part:

> (b) Eligibility. The following categories of aliens, who are otherwise eligible to apply for legalization, may file for adjustment to temporary residence status:
>
> . . .
>
> (9) An alien who would be otherwise eligible for legalization and who was present in the United States in an unlawful status prior to January 1, 1982, and reentered the United States as a nonimmigrant, such entry being documented on Service Form I-94, Arrival-Departure Record, in order to return to an unrelinquished unlawful residence.

> (10) An alien described in paragraph (b)(9) of this section must receive a waiver of the excludable charge 212(a)(19) as an alien who entered the United States by fraud.

The ground of excludability at section 212(a)(19) of the Act has been replaced by the ground of inadmissibility listed at section 212(a)(6)(C)(i) of the Act, as amended.

Section 212(a)(6)(C) of the Act provides in pertinent part:

> Misrepresentation. – (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

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).

Failure to provide evidence other than affidavits shall not be USCIS' sole basis for finding that an applicant failed to meet the continuous residence requirement. *See* CSS/Newman Settlement Agreements. In evaluating the sufficiency of the applicant's proof of residence, [USCIS] shall take into account the passage of time and other related difficulties in obtaining documents that corroborate unlawful residence during the requisite periods. *See id.*

The regulation at 8 C.F.R. § 245a.1(c) read in conjunction with the CSS/Newman Settlement Agreements provides, in relevant part, that an alien shall be regarded as having resided continuously in the United States if:

> (i) 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 for temporary resident status is filed [during the original filing period or the date that the alien was discouraged from filing], unless the alien can establish that due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed.

Although the regulations provide an illustrative list of contemporaneous documents that an applicant may submit, the list also permits the submission of affidavits and any other relevant document. *See* 8 C.F.R. § 245a.2(d)(3)(vi)(L).

The application and other statements of the applicant, both oral and written, are evidence to be considered. *See Matter of E-M-,* 20 I&N Dec. 77 at 79. The applicant's statements must not be the applicant's only evidence used to establish eligibility, but they should be viewed as valid evidence. *Id.*

Documentary evidence may be in the format prescribed by USCIS regulations. *See id.* at 80. For example, 8 C.F.R. § 245a.2(d)(3)(i) states that a letter from an employer should be signed by the employer under penalty of perjury and "state the employer's willingness to come forward and give testimony if requested." *Id.* Letters from employers that do not comply with such requirements do not have to be accorded as much weight as letters that do comply. *Id.* However, even if not in compliance with this regulation, a letter from an employer should be considered as a "relevant document" under 8 C.F.R. § 245a.2(d)(3)(iv)(L). *Id.* Also, affidavits that have been properly attested to may be given more weight than a letter or statement. *Id.* Nonetheless in determining the weight of a statement, it should be examined first to determine upon what basis it was made and whether the statement is internally consistent, plausible and credible. *Id.* What is most important is whether the statement is consistent with the other evidence in the record. *Id.*

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. *Id.* at 79-80. In evaluating the evidence, *Matter of E-M-* also states 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 or 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, 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, to deny the application or petition.

On September 15, 2009, the AAO issued a notice of intent to dismiss in this matter. That notice stated that at issue in this proceeding is whether the applicant has established that he is admissible and whether he has submitted consistent, sufficiently detailed evidence to meet his burden of establishing continuous residence in the United States throughout the requisite period.

On May 26, 2005, the applicant filed the Form I-687 pursuant to the terms of the CSS/Newman Settlement Agreements. He also indicated on the CSS/Newman (LULAC) Class Membership Worksheet, Form I-687 Supplement, which is dated May 18, 2005 and was submitted with the Form I-687 received on May 26, 2005, that he is a CSS or Newman (LULAC) class member.

The director issued a notice of decision in which he indicated that the applicant had failed to establish that he resided in the United States throughout the requisite period. The director did not specify what was lacking in the affidavits which the applicant submitted to support his claim that he resided in the United States throughout the relevant period.

On appeal, the applicant stated through counsel that the evidence in the record establishes that he is eligible to adjust to temporary resident status under the CSS/Newman Settlement Agreements.

As a preliminary matter, the AAO notes that on the Form I-687, the applicant indicated that he exited the United States during January 1988. The record establishes that he re-entered the United States as a nonimmigrant B-1/B-2 visitor on March 6, 1988, August 1, 1989 and February 19, 1991, using a Border Crossing Card which was stamped in his passport on January 26, 1988 in Mexico. Throughout this proceeding, the applicant has claimed that on May 20, 1987 an Immigration and Naturalization Service (INS) officer rejected his Form I-687 because he was absent from the United States for two weeks during December 1986/January 1987. Thus, according to the evidence that the applicant submitted, the requisite period in this matter ended on May 20, 1987. As such, if the applicant was absent from the United States for over 45 days from January 1, 1988 through March 6, 1988 that absence would not represent a break in continuous residence during the requisite period.

The notice of intent to dismiss pointed out that the record includes the following inconsistent or adverse evidence regarding the applicant's claim that he resided continuously in the United States throughout the requisite period, that he is admissible to the United States and that he is otherwise eligible to adjust to temporary resident status:

1. The Form I-687 on which the applicant stated under penalty of perjury, where he was to list all his U.S. employment since entry, that: from 1980 through 1981, he worked at various jobs, such as cleaning, gardening, labor, etc., in Gardena, California; from 1981-1986, he worked for [redacted] pool service in Lake Forest. California; from 1986-1987, he worked as a laborer at [redacted] in Los Angeles, California; from 1987-1988, he worked as a machinist at Tri-Delta-Color Chemical Corporation in Long Beach, California; and from 1988-1989, he worked as a laborer at [redacted]. in San Rafael, California.

2. Notes from the October 18, 2006 CSS/Newman legalization interview which indicate that the applicant testified that he worked for [redacted] full service cleaning from 1980-1986 in La Mesa, California doing stonework, landscaping and pool cleaning; that he worked at McDonald's Restaurant during 1986; and that he then worked at a factory which made plastics with color until 1988. At this interview, the applicant also testified that he lived with [redacted] and his family at [redacted], California from 1980 through 1988 and that from there he moved to Northern California. The AAO notes that according to maps available at www.mapquest.com, it is over 118 miles drive from La Mesa, California to Gardena, California, ([redacted] to [redacted], (accessed September 8, 2009).[3]

[3] The applicant did not provide an address in La Mesa for his employer at the CSS/Newman legalization interview. This office used the address of the La Mesa Police Department to

3. The affidavit of [redacted] dated May 18, 2005 on which [redacted] attested that he worked with the applicant on different projects between 1981 and 1986. The affidavit does not indicate that [redacted] employed the applicant, as he stated on the Form I-687. The affidavit is not detailed in that it does not specify: how often the applicant and [redacted] worked together; the longest period of time that the two of them went without seeing each other during 1981 through 1986; what type of work the two of them did; in what country the two of them worked; or what the applicant's home address was during this period of employment.

4. The affidavit of [redacted] dated May 7, 2005 on which [redacted] attested that the applicant lived at her house at [redacted] from 1980 through 1988. The affidavit is not detailed in that it does not indicate, for instance, the longest period of time that the applicant and [redacted] went without seeing each other during 1980 through 1988.

5. The affidavit of [redacted] dated May 14, 2005 on which [redacted] attested that he has known the applicant since 1980 and that an INS officer rejected the applicant's INS application on May 20, 1987 for minor reasons. The affidavit is not detailed in that it does not indicate, for instance, the longest period of time that he went without seeing the applicant during 1980 through 1988.

6. The applicant presented himself to U.S. officials as a lawful nonimmigrant on March 6, 1988, August 1, 1989 and February 19, 1991 in order to be allowed entry that he might reside indefinitely in the United States.

The record indicates that the applicant willfully misrepresented himself as a lawful nonimmigrant upon entry three times in order to gain a benefit under the Act. Namely, he sought to gain entrance into the United States. Thus, the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act. The AAO stated in the notice of intent to dismiss that the applicant had not submitted to the director the Form I-690, Application for Waiver of Grounds of Excludability, which is the form he must file to request a waiver of this ground of inadmissibility.

The AAO provided the applicant the opportunity to file the Form I-690 with the director. The AAO requested that the applicant provide, in response to that notice, proof that that form had been properly filed as well as a copy of that filing including any documentation filed to support that request.

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approximate the distance between La Mesa and the address which the applicant listed as his home in Gardena, California. The address listed for the applicant's employer [redacted] on the Form I-687 is also the address which [redacted] listed as his current home address on his May 18, 2005 affidavit in the record.

The applicant did not respond to the notice of intent to dismiss.

The notice of intent to dismiss also states that the evidence in the record includes inconsistencies such as: testimony which states that during 1986, the applicant was employed at McDonald's Restaurant and statements on the Form I-687 which indicate that he worked elsewhere in 1986; and the Form I-687 which states that the applicant was employed by [redacted] pool service from 1981-1986, [redacted] affidavit which indicates that the two men merely worked alongside each other at various projects during 1981-1986, as well as the applicant's October 18, 2006 testimony which indicates that from 1980-1986 he worked for [redacted]s full service cleaning, doing stonework, pool cleaning and landscaping, based in an office located more than one-hundred and fifteen miles from his stated home address.

These discrepancies cast doubt on the authenticity of the evidence of record, including the applicant's claim that he resided continuously in the United States from a date prior to January 1, 1982 through the end of the requisite period.

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, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

The inconsistencies in the record may only be overcome through independent, objective evidence of the applicant's claim that he resided continuously in the United States throughout the relevant period.

The AAO pointed out in the notice of intent to dismiss that the applicant had provided one piece of independent evidence, a photocopy of his California Identification Card which was apparently issued on July 7, 1987. This single piece of contemporaneous evidence is not sufficient to establish that the applicant was residing continuously in the United States throughout the relevant period, and is not sufficient to overcome the inconsistencies in the record discussed earlier.

The AAO provided the applicant the opportunity to provide, in response to the notice of intent to dismiss, any objective, independent evidence available to him which supports the claim that he resided continuously in the United States throughout the relevant period.

The applicant did not reply to the notice of intent to dismiss.

The AAO finds that the applicant is not eligible to adjust to temporary resident status because he has not established continuous, unlawful residence throughout the relevant period. He also failed to demonstrate that he is admissible to the United States or that he has submitted a properly completed request for a waiver of the ground of inadmissibility to which he is subject. The appeal is dismissed for these reasons with each considered as an independent and alternative basis for denial.

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