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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

L1

[redacted]

FILE: [redacted] Office: LOS ANGELES Date: APR 01 2010

MSC 05 216 21177

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.

IN 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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The applicant's temporary resident status was terminated by the Director, Los Angeles, California. The appeal to the termination was initially rejected as untimely filed but the matter was reopened by the Director, National Benefits Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director determined that the applicant had not demonstrated that he had continuously resided in the United States in an unlawful status since before January 1, 1982 through the date that he attempted to file a Form I-687, Application for Status as a Temporary Resident, with the Immigration and Naturalization Service or the Service (now United States Citizenship and Immigration Services or USCIS) in the original legalization application period between May 5, 1987 to May 4, 1988. The director further determined that the applicant had not demonstrated that he was a class member in a requisite legalization class action lawsuit because he acknowledged that he did not depart this country during the required period. Therefore, the director concluded that the applicant was not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements and section 245A of the Immigration and Nationality Act (Act) and terminated the applicant's temporary residence.

On appeal, counsel objects to the termination of the applicant's temporary resident status as a USCIS officer had already reviewed the applicant's claim of residence in this country for the period in question, determined that the supporting evidence was sufficient to demonstrate such claim, and approved the Form I-687 application.

Although the director determined that the applicant had not established that he was eligible for class membership pursuant to the CSS/Newman Settlement Agreements, the director treated the applicant as a class member in terminating the applicant's temporary residence on the basis of whether the applicant had established continuous residence in the United States for the requisite period. Consequently, the applicant has neither been prejudiced by nor suffered harm as a result of the director's finding that the applicant had not established that he was eligible for class membership. The adjudication of the applicant's appeal as it relates to his claim of continuous residence in the United States since prior to January 1, 1982 shall continue.[1]

The status of an alien lawfully admitted for temporary residence may be terminated at any time if it determined that the alien was ineligible for temporary residence under section 245A of the Act. 8 C.F.R. § 245a.2(u)(1)(i).

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[1] The director made the finding that the applicant was not a class member was based upon conflicting claims that the applicant put forth regarding the specific number and circumstances concerning his absences from the United States during the requisite period. As the issue of the applicant's absences from this country in the period in question constituted the basis of the director's finding that the applicant was not a class member, this issue will not be examined in the context of the applicant's claim of residence since prior to January 1, 1982 because this office does not have jurisdiction to adjudicate class membership denials pursuant to the 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 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. *See* Paragraph 11, page 6 of the CSS Settlement Agreement and paragraph 11, page 10 of the Newman Settlement Agreement.

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 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 including affidavits is permitted pursuant to 8 C.F.R. § 245a.2(d)(3)(vi)(L).

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 "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.

The applicant submitted a Form I-687 application and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet, to USCIS on May 4, 2005. At part #4 of the Form I-687 application where applicants were asked to list other names used or known by, counsel indicated that the applicant had not used or was not known by any other names by listing "none." In addition, at part #30 of the Form I-687 application where applicants were asked to list all residences in the United States since first entry, counsel indicated that the applicant lived at '[redacted]' in Fall Brook, California from December 1981 to January 1985 and '[redacted]' in Westminster, California from January 1985 to November 1990. Further, at part #33 of the Form I-687 application, where applicants were asked to list all employment in the United States since entry, counsel indicated that the applicant had been employed as a day laborer at various locations from December 1981 to July 1985 and a presser at [redacted]n Costa Mesa., California from July 1985 to November 1997.

The record shows that the USCIS officer who initially reviewed and adjudicated the Form I-687 application and supporting documentation contained in the record granted the applicant temporary resident status on September 21, 2005. The applicant subsequently submitted a Form I-698, Application for Adjustment from Temporary to Permanent Resident, on January 11, 2006. In the process of reviewing the Form I-698 application, a different USCIS officer determined that the evidence in the record did not demonstrate that the applicant was eligible for temporary residence under section 245A of the Act and instituted termination proceedings as allowed under 8 C.F.R. § 245a.2(u)(1)(i).

In support of his claim of continuous residence in this country since prior to January 1, 1982, the applicant submitted a letter from the State of California Department of Motor Vehicles, school transcripts from Coastline Community College in Mountain View, California, photocopied paycheck stubs ranging in date from August 3, 1987 to January 23, 1988 for an individual, named '[redacted]' from [redacted] in Costa Mesa, California, and postmarked envelopes. This documentation in its totality is considered to be sufficient proof that the applicant resided in the United States from 1987 through the end of the requisite period on May 4, 1988.

Although the documents noted above tend to demonstrate that the applicant lived in this country since 1987, these documents also contain information that raises questions regarding the applicant's overall credibility as well the credibility of his claim of residence in the United States from prior to January 1, 1982 up until 1987. Specifically, counsel indicated that the applicant

was not known by and had not used any other names at part #4 of the Form I-687 application but the paycheck stubs from [redacted] contain the name [redacted] rather than the applicant's full and actual name or a portion thereof. An envelope postmarked August 21, 1987 and an envelope containing an indiscernible post mark listed the applicant's address as [redacted] in Westminster, California, while an envelope postmarked March 28, 1988 listed the applicant's address as [redacted] These addresses did not conform with the address of residence, [redacted]' in Westminster, California, from January 1985 to November 1990 attributed to the applicant by counsel at part #30 of the Form I-687 application filed on May 4, 2005. In addition, the school transcripts from Coastline Community College reflect that the applicant last attended high school in "Mexico" in 1986, prior to beginning classes at this institution in the spring semester of 1987. It is considered significant that the record contains contemporaneous evidence that directly contradicted information listed on the Form I-687 application filed on May 4, 2005 relating to the applicant's claim of residence in the United States since prior to January 1, 1982.

A review of the record reveals that the applicant had previously asserted a claim to class membership in one of the legalization class-action lawsuits, and as such was permitted to file a separate Form I-687 application on February 2, 1990. At part #4 of the Form I-687 application where applicants were asked to list other names used or known by, the preparer indicated that the applicant had not used or was not known by any other names by referring to the applicant's actual name as listed at part #2 of the Form I-687 application. Furthermore, at part #33 of this Form I-687 application (the difference in the numbering of parts on the two separate Form I-687 applications is explained by the fact that the application format was revised as of October 26, 2005) where applicants were asked to list all residences in the United States since first entry, the preparer listed the applicant's addresses as [redacted]" in Westminster, California from October 1981 to July 1984 and [redacted]' in Westminster, California from July 1984 to the date this Form I-687 application was submitted on February 2, 1990. In addition, at part #36 of this Form I-687 application, where applicants were asked to list all employment in the United States since entry, the preparer indicated that the applicant had been employed as a presser at [redacted] in Costa Mesa, California from November 1981 to the date this Form I-687 application was submitted on February 2, 1990. The record shows that this Form I-687 application was prepared on the applicant's behalf by [redacted] and that the applicant signed the Form I-687 application certifying under penalty of perjury that all information contained in this document was true and correct.

The fact that the Form I-687 application submitted on February 2, 1990 and Form I-687 application submitted on May 4, 2005 contain conflicting and contradictory information regarding the applicant's addresses of residence and his employment history further diminishes his credibility as well as the credibility of his claim of residence in this country for that period from prior to January 1, 1982 up until 1987.

The applicant provided numerous photographs which purport to reflect his residence in the United States during the requisite period. Nevertheless, these photographs have no probative

value as neither the date such photographs were taken nor the specific locations depicted in these photographs can be discerned.

The applicant included affidavits that are signed by [redacted] and [redacted] Although all of the affiants attested to the applicant's residence at localities in southern California for the requisite period or a portion thereof, their testimony is general and vague and does not provide any other relevant and verifiable information to corroborate the applicant's claim of continuous residence in this country since prior to January 1, 1982 up until 1987.

The applicant submitted two affidavits signed by [redacted] that are dated August 9, 2001, and June 10, 2003, respectively. In his affidavits, [redacted] acknowledged that he is the applicant's uncle and he has personal knowledge that the applicant resided in the United States since December 1981 because the applicant lived with him in his home at [redacted] in Fall Brook, California from this date through January 11, 1985. [redacted] noted that the applicant did not attend school in this period and instead supported himself as a day laborer until he moved to Westminster, California in January 1985 and he subsequently went to work for a dry cleaner. While [redacted] testimony regarding the applicant's address of residence and employment history conforms to information at parts #30 and #33 of the Form I-687 application filed on May 4, 2005, his testimony conflicted with corresponding information listed at parts #33 and #36 of the Form I-687 application submitted on February 2, 1990.

The applicant provided an affidavit that is signed by [redacted]. Mr. [redacted] declared that he had known the applicant since birth because they were cousins and the applicant had lived in the southern California area since 1981.

It must be noted that that both [redacted] and [redacted] admitted that they are related to the applicant and must be considered as family members with an interest in the outcome of these proceedings rather than disinterested third party witnesses.

The applicant included a letter dated June 6, 2003 that is typed on letterhead stationery and signed by [redacted] of [redacted]' in Santa Ana, California. Dr. [redacted] stated that the applicant had been his patient from 1985 to the present. However, the testimony of [redacted] is of limited probative value as it was not accompanied by any corresponding medical records and his testimony lacked specific, detailed, and verifiable information to substantiate the applicant's claim of residence in this country.

The applicant submitted three affidavits that are signed by [redacted] and dated August 21, 2001, June 14, 2003, and April 13, 2005. In her affidavits, [redacted] stated that the applicant lived in her home at [redacted] in Westminster, California from January 25, 1985 to November 25, 1990. [redacted] noted that the applicant performed general maintenance and repairs to her home and landscaping in exchange for room and board during that period. Although [redacted] testimony regarding the applicant's address of residence conforms to

information at parts #30 of the Form I-687 application filed on May 4, 2005, her testimony conflicted with corresponding information listed at parts #33 of the Form I-687 application submitted on February 2, 1990.

The applicant included five affidavits and a declaration all signed by [redacted]. A summary of each document is provided as follows:

- An affidavit dated February 3, 1990, in which [redacted] stated that he employed the applicant as a presser for $60.00 in cash per week from December 1981 to August 1987.

- An affidavit dated February 3, 1990, in which [redacted] declared that he employed the applicant as a presser at [redacted] in Costa Mesa, California for $4.00 per hour, $8000.00 annually from September 1987 to the date the affidavit was executed on February 3, 1990.

- An affidavit dated September 4, 2001, in which [redacted] attested to the applicant's employment at [redacted] from July 20, 1985 to November 25, 1997.

- An affidavit dated June 22, 2003, in which [redacted] noted that he employed the applicant at [redacted] for a twelve year period.

- An affidavit dated April 13, 2006, in which [redacted] testified that he employed the applicant at [redacted] from July 20, 1985 to November 25, 1997.

- A declaration dated April 14, 2008 and written in English that is presented as a translation of verbal statements made in Korean, in which [redacted] stated that he employed the applicant at his dry cleaning store, [redacted] from December 1986 to December 1997. [redacted] declared that he had been introduced to the applicant as "[redacted]" and that it took him many years to correctly learn the applicant's actual and full name. [redacted] noted that the applicant first approached him in September of 2001 to obtain an employment affidavit and that his daughter prepared this affidavit because he cannot read or write English. [redacted] asserted that the dates of employment attributed to the applicant in the affidavit dated September 4, 2001 were "...slightly off." [redacted] declared that the applicant's attorney recently had him review two affidavits executed in 1990 attesting to the applicant's employment and purportedly containing his signature. Although [redacted] acknowledged that the affidavits executed in 1990 "...looked to be signed by me, they are not my signature." [redacted] stated that he had never seen these two documents before and that he neither signed nor submitted the two affidavits on the applicant's behalf.

While [redacted] disavowed the authenticity of the two affidavits dated February 3, 1990, none of the affidavits or declaration cited above included the applicant's address of residence during his period of employment as required under 8 C.F.R. § 245a.2(d)(3)(i). In the remaining three affidavits dated September 4, 2001, June 22, 2003, and April 13, 2006, [redacted] consistently testified that he employed the applicant at [redacted] for a twelve year period from July 20, 1985 to November 25, 1997 without mentioning that the applicant had been known by the name [redacted]. Mr. [redacted] subsequently recanted and reiterated his prior testimony in his most recent declaration dated April 14, 2008, by indicating that an error in stating the dates of the applicant's employment had been made by his daughter when she prepared the affidavit dated September 1, 2001. However, [redacted] explanation does not address either how the same error was also made on the affidavits dated June 22, 2003 and April 13, 2006 or why [redacted] failed to mention that the applicant was known to him as [redacted] in any of his prior attestations to the applicant's employment.

The applicant submitted a declaration dated April 23, 2008 in which he claimed that the preparer of the Form I-687 application filed on February 2, 1990, [redacted], had provided false and inaccurate information on this document and manufactured fraudulent evidence in support of his claim of residence in this country for the requisite period. The applicant contended [redacted] took advantage of his inability to speak, read, write, and understand English and that he was unaware of the false information in the Form I-687 application and supporting documents. Specifically, the applicant disavowed the authenticity of the two affidavits purportedly signed by [redacted] and dated February 3, 1990, and the affidavits signed by [redacted], and [redacted]. The applicant asserted that [redacted] told him that he was an attorney, charged him $5000.00 to prepare and submit the Form I-687 application and corresponding supporting documents, and then absconded from the United States some time after the Form I-687 application was filed on February 2, 1990. The applicant declared that [redacted] had done the same thing to a number of other people including his sister and brother-in-law, as well as the sisters and father of his brother-in-law. The applicant stated that paycheck stubs ranging in date from August 3, 1987 to January 23, 1988 for an individual named "[redacted] from [redacted] in Costa Mesa, California were actually genuine and reflected the inability of [redacted] and others to correctly remember and pronounce his real name. However, it must be noted that the record is absent any claim that the applicant used or was known by any name other than his real and actual name prior to [redacted] and the applicant advancing this claim in their declarations dated April 14, 2008 and April 23, 2008, respectively.

Counsel included a statement dated April 24, 2008, in which she repeated the claim that the applicant had been a victim of fraud because of false information contained in the Form I-687 application filed on February 2, 1990 and the two affidavits attributed to [redacted] and dated February 3, 1990. Counsel submitted a commercial lease reflecting that [redacted] rented premises located at [redacted], in Costa Mesa, California to conduct business as [redacted] from October 1, 1996 to September 30, 2001. Counsel asserted that the lease was proof that [redacted] did not own or operate [redacted] in that period listed for the applicant's employment in the fraudulent affidavits attributed to [redacted] and dated

February 3, 1990. Counsel reiterated [redacted] most recent testimony in his declaration dated April 14, 2008 that he employed the applicant at [redacted] from December 1986 to December 1997. However, contrary to counsel's assertion, the commercial lease demonstrates nothing other than the fact that [redacted] rented the premises in question to conduct business as [redacted] in the period from October 1, 1996 to September 30, 2001 without providing any information regarding either the date he began to operate [redacted] or that period he employed the applicant at this establishment.

Counsel, the applicant, and [redacted] all claimed that the Form I-687 application filed on February 2, 1990 and the two affidavits represented as having been signed by [redacted] and dated February 3, 1990 were fraudulently created documents containing false information. The applicant further contended that he and others were victimized by [redacted] who perpetrated the fraud, stole large amounts of money from a number of people, and absconded from the country. However, none of the parties provided any independent evidence to support these claims and assertions. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The director determined that the supporting documents and testimony in the record contained in the record could not be considered as credible because of the discrepancies discussed above relating to critical elements of the applicant's claim of residence in the United States. As a result, the director found that the applicant failed to establish that he continuously resided in this country in an unlawful status since before January 1, 1982. Therefore, the director concluded that the applicant was not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements and section 245A of the Act and terminated the applicant's temporary resident status on July 30, 2008.

On appeal, counsel asserts that the USCIS officer who initially adjudicated the Form I-687 application filed on May 4, 2005 determined that the applicant had submitted sufficient evidence to grant the applicant temporary residence. However, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Counsel contends that the USCIS officer who subsequently instituted proceedings to terminate the applicant's temporary resident status erred in determining that such evidence did not establish the applicant's eligibility. Counsel's remarks on appeal regarding the sufficiency of the evidence in

the record are noted. Nevertheless, counsel's contention is without merit as the discrepancies and conflicts in the evidence and testimony contained in the record relating to the applicant's addresses of residence and employment history in the requisite period are directly material and relevant to his claim of residence in the United States for this period. The AAO conducts a de novo review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility and making a determination based upon a preponderance of the evidence as required by the regulation at 8 C.F.R. § 245a.2(d)(5) as well as the precedent decision reached in *Matter of E-- M--*, 20 I. & N. Dec. 77 (Comm. 1989).

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 record contains contemporaneous evidence, paycheck stubs, postmarked envelopes, and school transcripts, relating to the applicant's purported use of another name and addresses of residence that directly contradicts critical elements of the applicant's claim of residence in the United States for the entire requisite period. The conflicting nature of additional evidence and testimony relating to his employment history further impairs the credibility of the applicant's claim of residence in this country for the period in question. Pursuant to 8 C.F.R. § 245a.2(d)(3), the inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. The applicant has failed to submit sufficient credible documentation to meet his burden of proof in establishing that he has resided in the United States since prior to January 1, 1982 by a preponderance of the evidence as required under both 8 C.F.R. § 245a.2(d)(3) and *Matter of E- M-*, 20 I&N Dec. 77 (Comm. 1989).

Under these circumstances, it cannot be concluded that the applicant has established that the claim of continuous residence from before January 1, 1982 is credible and probably true. Therefore, the applicant has not established eligibility for temporary residence under the terms of the CSS/Newman Settlement Agreements and section 245A of the Act. As the applicant has not overcome the grounds for termination of status, the appeal must be dismissed.

It is further noted that the applicant was arrested on May 6, 2001 by the Garden Grove Police Department. He was charged with violating section 647(f) of the California Penal Code, *drunk in public*. The charge was dismissed. On December 3, 1999, the applicant was charged with violating section 23512(a), *driving while intoxicated*, and section 23512(b) of the California Vehicle Code, *driving with a blood alcohol concentration of more than 0.08%*. On January 3, 2000, the applicant pled guilty to the first charge. [redacted]

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