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FILE: [Redacted] Office: LOS ANGELES Date: **AUG 05 2008**
MSC 06 160 25613

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:

SELF-REPRESENTED

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.

Michael T. Kelly
Robert P. Wiemann, 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, and *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 District Director, Los Angeles, California. The decision 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 Class Membership Worksheet, initially stamped as received January 17, 2006. The applicant attended a Citizenship and Immigration Services (CIS) interview on November 8, 2006. The director issued a Request for Further Evidence (RFE) on that same date. Upon review of the record, the director denied the application on December 18, 2006. On appeal, the applicant submits a brief statement.

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 applicant attempted to file the application. 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 or attempting to file the application. 8 C.F.R. § 245a.2(b)(1).

Under the CSS/Newman Settlement Agreements, for purposes of establishing residence and physical presence, in accordance with the regulation at 8 C.F.R. § 245a.2(b)(1), "until the date of filing" shall mean 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 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).

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).

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.

The issue in this proceeding is whether the applicant has furnished sufficient evidence to establish his entry into the United States prior to January 1, 1982 and continuous unlawful residence since such date through the date he attempted to file the application.

On the Form I-687, the applicant indicated he had last entered the United States on May 10, 1999. The applicant listed his addresses for the pertinent time period as: [REDACTED] Oxnard, California from 1981 to 1985; [REDACTED] Oxnard, California from 1985 to 1986; and an unknown address in Phoenix, Arizona from 1987 to May 1997. The applicant listed employment at: "Old Mexico" on "A" Street in Oxnard, California from 1981 to 1987 as a dishwasher; and a self-employed construction worker in Arizona from 1987 to 1997. The applicant listed two absences from the United States on the Form I-687: an absence in December 1986 to January 1987 to visit family in Mexico; and an absence in May 1999 to visit family in Mexico. The applicant's date of birth is October 20, 1967.

The record also includes the applicant's affidavit dated December 31, 2005 wherein the applicant declares that he entered the United States for the first time without inspection in 1981; that in December 1986 he traveled to Mexico to see his family; and that upon his return he learned of the amnesty program and attempted to apply but was rejected.

The record further includes notes of the applicant's testimony on November 8, 2006 wherein the applicant under oath stated: he entered the United States for the first time in the middle of 1981; that he departed the United States twice: (1) in July 1982 for one month and (2) either beginning or the middle of 1985 staying two months to see his son.

The record also contains the following information submitted to establish the applicant's continuous residence in the United States for the applicable time period:

- A November 4, 2006 affidavit signed by [REDACTED] of San Diego who declares that he has known the applicant since the beginning of 1981, that he met the applicant through his dad, that the applicant worked as a gardener at his house for

about five years, and that he saw the applicant again in the year 2000 and has seen him regularly since then.

- An October 25, 2006 affidavit signed by [REDACTED] residing in Port Hueneme, California who declares that he personally knows that the applicant was employed at "Zapateria Canada" in Oxnard, California from January 1981 through 1984 because he worked with the applicant during the stated years until the shoe store closed.
- An October 31, 2006 affidavit signed by [REDACTED] of Oxnard, California who declares that she personally knows that the applicant worked at "Old Mexico" restaurant from January 1981 through November 1986 because she also worked at the same establishment until the restaurant closed.
- A November 4, 2006 affidavit signed by [REDACTED] of Oxnard, California who declares that she personally knows that the applicant worked part-time at "Old Mexico" restaurant from January 1981 through November 1986 because she also worked at the same establishment.
- A November 4, 2006 affidavit signed by [REDACTED] who declares that she personally knows that the applicant resided at [REDACTED], Oxnard, California from 1981 to 1986 because she also resided at the same residence during the stated years. A utility bill dated October 25, 1985 issued to [REDACTED] at [REDACTED] Oxnard, California is attached to [REDACTED]' affidavit, as well as a photocopy of a receipt issued to [REDACTED] (last names indiscernible) at [REDACTED], dated August 12, 1985.
- A photograph of an individual with a microphone and an indiscernible individual in the background with a bottle of beer. The applicant captioned the photo by indicating he is the individual in the background and that the singer is [REDACTED] and that the photo was taken at the "Old Mexico" restaurant in 1983 or 1984.

The record further includes information that the applicant was arrested for driving under the influence and related charges on March 13, 2004. The defendant pled guilty to one count, 23152(b) VCM, and the remaining charges were dismissed. The applicant was sentenced to three months unsupervised probation subject to the terms and conditions of the probation order. The record contains a December 6, 2006 notice of completion in drinking driver program and participant completion report from Ventura County, California.

In the denial decision dated December 18, 2006, the director observed that the applicant's statement that he entered the United States in the middle of 1981 and worked as a dishwasher for a restaurant from 1981 to 1987 is inconsistent with [REDACTED] declaration that the applicant worked for a shoe store from January 1981 to 1984. The director also noted that the photograph of the applicant sitting with a beer bottle in front of him, if taken in 1983 or 1984 would have been taken when the applicant was only 16 or 17 years old and too young to be served beer. The director further found that the applicant's visit to Mexico to see his son born in 1986 exceeded 45 days. The director denied the application as the applicant had failed to establish continuous residence in the United States for the requisite time period for the reasons noted.

On appeal, the applicant responds to the director's decision by noting that he was confused when he said that he worked at the shoe store in 1981 and that he should have indicated he worked there in 1982; that due to the passage of time, the affiant [REDACTED] was also incorrect in stating that he (the applicant) worked at the shoe store in 1981; that the beer, in the photograph of him sitting at a table listening to a singer in 1983 or 1984 when he would have been only 16 or 17, was not his beer; and that his visits to Mexico were (1) at the end of January 1985 to get married, returning February 4, 1985, and (2) at the beginning of June 1985 and returning early July 1985, and was not for two months.

The AAO has reviewed the record in this matter and finds that the applicant has not established his continuous unlawful residence in the United States for the applicable time period. The record contains inconsistencies within the applicant's testimony and the affidavits submitted. The applicant has presented four affidavits referencing his employment and three of the affidavits indicate his employment in the United States began in January 1981; yet the applicant testified he did not enter the United States until the middle of 1981. In addition, two of the affidavits, signed by [REDACTED] and [REDACTED] conflict with the affidavit of [REDACTED] regarding the location of his employment. The inconsistencies between the affidavits and with the applicant's sworn testimony detract from the credibility of the affidavits. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The AAO acknowledges the applicant's observation on appeal, that the employment discussed occurred over 20 years ago, but the similarity of all three affidavits concerning the initial start date of employment in January 1981 which conflicts with the applicant's verbal testimony establishes that the information in the affidavits is unreliable. The AAO finds the affidavits of [REDACTED] and [REDACTED] have minimal probative value.

Likewise the affidavit of [REDACTED] has minimal probative value. [REDACTED] does not provide a beginning and ending time frame for the applicant's work as a gardener at his house nor does [REDACTED] provide sufficient detail of the circumstances and events regarding his initial meeting with the applicant and subsequent interactions with the applicant. The affidavit lacks concrete information of the meetings, conditions, or incidents of his claimed relationship with the applicant during the requisite time period. Similarly, the November 4, 2006 affidavit of [REDACTED] does not provide sufficient details establishing how she initially met the applicant, a 14 year-old boy in 1981 and does not provide detailed evidence of her relationship with the applicant from 1981 to 1986.

The AAO has also reviewed the photograph that the applicant stated was taken in 1983 or 1984. The photograph does not contain any internal identifying evidence establishing when or where the photograph was taken. Captioning a photograph with dates is insufficient to establish when the photograph was taken. Moreover the photograph is not sufficiently clear to determine that the applicant is the individual in the background. The photograph has no probative value in this matter.

Upon review of the entire record in this matter, the AAO finds the documentation submitted lacks probative value in establishing the applicant's entry into the United States prior to January 1, 1982 and continuous unlawful residence in the United States for the requisite time period. The deficient documentation and the

applicant's statement comprise the only evidence of the applicant's residence in the United States from prior to January 1, 1982 through the requisite time period. This information lacks credibility and probative value for the reasons noted. The absence of credible and probative documentation to establish the applicant's claim of continuous residence for the entire requisite period seriously detracts from the credibility of his claim. Pursuant to 8 C.F.R. § 245a.2(d)(5), 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 meet his burden of proof and failed to establish continuous residence in an unlawful status in the United States from prior to January 1, 1982 through the date he attempted to file a Form I-687 application, 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 appeal will be dismissed.

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