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U.S. Citizenship
and Immigration
Services

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FILE:

MSC-06-102-15956

Office: NEW YORK

Date: DEC 29 2008

IN RE: Applicant:

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:

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.

A handwritten signature in black ink, appearing to read "John F. Grissom".

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, 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 Director, New York. 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. The director denied the application, finding that the applicant 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 period. Specifically, the director states that because the applicant was absent from the United States on January 1, 1982, he is statutorily ineligible to adjust to temporary resident status.

On appeal, the applicant asserts that the director was incorrect when she stated that his absence specifically on January 1, 1982 caused him to be statutorily ineligible to adjust to temporary resident status.

The AAO finds that the director erred when she stated that the applicant's 28 day absence that straddled the date January 1, 1982 caused him to be ineligible to adjust to temporary resident status. Neither the Immigration and Nationality Act (Act) nor the relevant regulations specify that applicants must have been present specifically on January 1, 1982 to be eligible to adjust to temporary resident status.

The director's error is harmless because the AAO conducts a *de novo* review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility as required by the regulation at 8 C.F.R. § 245a.2(d)(6). The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The AAO withdraws the director's statement that the applicant's absence on January 1, 1982 caused him to be statutorily ineligible to adjust to temporary resident status.

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 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). To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from his or her 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).

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.* 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 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, deny the application or petition.

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 affidavits of relationship written by the applicant's landlord, friends and family, affidavits of employment, receipts, checks received by the applicant during the requisite period, the applicant's son's school records, original airline tickets, original Forms W-2 issued to the applicant during the requisite period, the applicant's Social Security Statement, bank statements, and an attestation from a representative from the applicant's church. 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 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.

The record contains two Forms I-687. The applicant submitted his first Form I-687 in 1990. This Form I-687 shall be referred to as his 1990 Form I-687. He also submitted a Form I-687 pursuant to the late filing provisions of the settlement agreement on January 10, 2006. This Form I-687 shall be referred to as the applicant's current Form I-687. These two Forms I-687 are not consistent regarding either the applicant's address of residence or absences from the United States during the requisite period.

The applicant's 1990 Form I-687 states that he resided on [REDACTED] in New York from November 18, 1980 until the end of the requisite period. However, his current Form I-687 states that he resided at [REDACTED] in Astoria, New York from 1980 to 1990. As will be discussed, evidence submitted by the applicant in support of these Form I-687 applications respectively corresponds with these two addresses of residence.

The applicant's 1990 Form I-687 states that he was absent from the United States once during the requisite period, from July to August of 1987. However, his current Form I-687 indicates that he was absent for four months in 1984. This absence constitutes a single absence of more than 45 days during the requisite period. There are no other absences during the requisite period indicated on this form. A sworn statement taken from the applicant by a United States Citizenship and Immigration Services (USCIS) immigration officer when he was interviewed regarding his current Form I-687 application indicates that the applicant was absent from the United States in December 1984 for approximately 30 days and then in March 1987 for approximately 30 days.

A Form I-130 completed by the applicant's former spouse indicates that the applicant had an additional absence from the United States. This form states that the applicant resided in San Salvador, El Salvador at the time she signed the form on June 14, 1982. This indicates that the applicant was also absent from the United States in June of 1982.

These inconsistencies cast grave doubt on whether the applicant fully and accurately disclosed the number of his absences from the United States during the requisite period or his address of residence in the United States during the requisite period. The inconsistencies further cast doubt on whether he resided continuously in the United States for the duration of the requisite period. It is incumbent upon the applicant 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. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Affiants [REDACTED] and [REDACTED] state that the applicant has resided on [REDACTED] in Brooklyn from 1981 until they submitted their affidavits in December 1989. Though this address of residence is consistent with the address stated on the applicant's 1990 Form I-687, it is not consistent with the address he stated he resided at during the requisite period on his current Form I-687. This inconsistency casts doubt on whether the applicant has accurately stated his address of residence during the requisite period to United States Citizenship and Immigration Services (USCIS).

Affiant [REDACTED] states that he has known the applicant since November 1980. However, the affiant does not state whether he knows if the applicant resided in the United States during the requisite period. Therefore, this affidavit carries no weight as evidence that he did so.

The applicant submitted receipts that indicate that he purchased T-shirts in New York in 1983, 1987 and 1988. The record also contains a marriage certificate that states he married [REDACTED] in Astoria, New York on November 27, 1981.

The record also contains photocopies of three passports issued to the applicant. Salvadoran passport # [REDACTED] was issued to the applicant on October 3, 1979. Page 13 of this passport contains a United States B-2 Visa issued to the applicant on October 4, 1980. This passport also indicates that the applicant entered the United States on October 18, 1980 through Miami, Florida and that his stay was authorized until January 6, 1981. Passport # [REDACTED] was issued to the applicant by the consulate general of El Salvador in New York on October 21, 1981. Page 5 of this passport indicates that the applicant was in the Airport in San Salvador in December of 1981. Though the record also contains a photocopy of pages of Salvadoran passport # [REDACTED], this passport was not issued until after the requisite period ended. Therefore, it does not pertain to the matter at hand.

The record contains photocopies of envelopes addressed to the applicant in the United States and postmarked during the requisite period. However, the addresses on these envelopes are not all consistent with the address that the applicant stated he resided at during the requisite period on his current Form I-687.

The record also contains photocopies of envelopes addressed to the applicant at [REDACTED] Apartment [REDACTED] in New York that bear postmark dates of September 3, 1986 and December 10, 1987. While this address is consistent with the address that the applicant stated he resided at on his current Form I-687, it is not consistent with the address that he stated he resided at on his 1990 Form I-687.

The record also contains photocopies of envelopes addressed to the applicant at [REDACTED] in Brooklyn, New York that bear postmark dates in 1981, 1982 and 1984. It is noted that the applicant has also submitted additional photocopies of envelopes, all of which are addressed to him at the [REDACTED]

Street address. However, the postmark dates on the photocopies are not legible. While the applicant indicated that he resided on [REDACTED] during the requisite period on his 1990 Form I-687, this address is not consistent with the applicant's stated address during that period on his current Form I-687.

The record also contains a photocopy of an envelope addressed to the applicant on [REDACTED] in Corono, New York in January 1988. This is not an address that the applicant stated he resided at during the requisite period on either his 1990 or his current Form I-687.

As previously noted, the record also contains two Forms I-687 from the applicant as well as other forms and statements submitted by the applicant when he applied for immigration benefits. Though discrepancies among these were not noted in the director's decision, upon *de novo* review, the AAO discovered that these statements were not consistent regarding the applicant's absences from the United States. The contradictions are material to the applicant's claim in that they have a direct bearing on the applicant's residence in the United States during the requisite period. Specifically, the applicant's statement on his current Form I-687 that he was absent from the United States for four months during the requisite period indicates that the applicant was absent from the United States for a period of more than 45 days during the requisite period. The record does not contain any evidence that the applicant's timely return to the United States was delayed due to an emergent circumstance.

Though the AAO informed the applicant of these inconsistencies in a Notice of Intent to Deny (NOID), issued on November 10, 2008 and afforded him 15 days within which to submit evidence in response to these findings, the applicant did not respond to the AAO's NOID. Because the record contains contradictory statements regarding the applicant's absences from the United States during the requisite period and because the applicant has not provided an explanation for these contradictions, 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.