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U.S. Citizenship
and Immigration
Services

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FILE:

MSC 05 330 10258

Office: NEW YORK

Date: FEB 08 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. The file has been returned to the office that originally decided your case. If your appeal was sustained, or if your case was remanded for further action, you will be contacted. If your appeal was dismissed, 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.


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, 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 determined 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. The director acknowledged the applicant's response to a Notice of Intent to Deny issued on May 17, 2006, but found that he failed to overcome the deficiencies addressed in the notice. The director denied the application, finding that the applicant had not met his burden of proof and was, therefore, not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements.

On appeal, the applicant asserts that his application and evidence were not properly processed in accordance with the CSS/Newman Settlement Agreements. He submits a written statement, but no additional evidence, in support of the appeal.

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)(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).

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 furnished sufficient credible evidence to demonstrate that he resided in the United States for the duration of the requisite period. Here, the submitted evidence is not relevant, probative, and credible.

The record shows that the applicant submitted a Form I-687 application and supplement to Citizenship and Immigration Services (CIS) on August 23, 2005. The applicant signed this form under penalty of perjury, certifying that the information he provided is true and correct. At part #30 of the Form I-687 application where applicants were asked to list all residences in the United States since first entry, the applicant reported his first address in the United States to be at _____ in Flushing, New York from August 1980 until December 1991. At part #32, where applicants were asked to list all absences from the United States, the applicant indicated only one absence during the relevant period, a visit to Malaysia in July 1987. The applicant’s residence information indicates that he continuously resided in the United States during the requisite period; however the applicant has failed to corroborate this testimony with credible and probative evidence.

The applicant failed to file with his application any corroborating evidence of his residence in the United States during the requisite period. To meet his burden of proof, an applicant must provide evidence of eligibility apart from his own testimony. 8 C.F.R. § 245a.2(d)(6).

On November 15, 2005, the director issued a Notice of Intent to Deny (NOID) to the applicant. The NOID provides that the applicant failed to submit documentation to establish his eligibility for Temporary Resident Status. The applicant was afforded thirty (30) days to provide additional evidence in response to the NOID. The regulation at 8 C.F.R. § 245a.2(d)(3) provides an illustrative list of documentation that

may be provided to establish proof of continuous residence in the United States during the requisite period. This list includes: past employment records; utility bills; school records; hospital or medical records; attestations by churches, unions or other organizations; money order receipts; passport entries; birth certificates of children; bank books; letters or correspondence involving the applicant; social security card; selective service card; automobile receipts and registration; deeds, mortgages or contracts; tax receipts; and insurance policies, receipts, or letters.

In response to the NOID, the applicant submitted evidence in support of his claim, including documentation related to an insurance policy opened in 1993; documentation related to various bank accounts dating back to 1989; a copy of his New York driver license issued in January 1994; a copy of his New York identification card issued in September 1992; copies of miscellaneous checks; a photocopy of his wife's credit card and driver license; and a copy of an MCI calling card. However, all of this evidence was dated outside the requisite period is therefore irrelevant to this proceeding. The only relevant evidence submitted included the following:

- A photocopy of an envelope or mailing label addressed to the applicant at a post office box in Flushing, New York. The document bears Malaysian postage stamps and postmarks showing an indiscernible date in 1988.
- A photocopy of an "Application for Transfer of Funds" dated September 8, 1986, which shows a cash transfer of \$2,000 from [REDACTED] to the applicant, via The Hong Kong and Shanghai Banking Corporation. The document lists the applicant's address as [REDACTED] in Flushing, New York.

The applicant also submitted a photocopy of an envelope addressed to the applicant and his spouse at a post office box in Flushing, New York. The document bears Malaysian postage stamps and postmarks, but the date cannot be determined. However, it is noted that the applicant testified during his interview with a CIS officer that his wife came to the United States in 1989, which suggests that the applicant did not receive this correspondence during the requisite period.

An applicant may also submit "any other relevant document." 8 C.F.R. § 245a.2(d)(3)(vi)(L). In response to the NOID, the applicant submitted one notarized letter, from [REDACTED] a resident of Flushing, New York. [REDACTED] stated that she met the applicant at a restaurant in Chinatown in February 1984. She stated that as she and the applicant are from the same country, they had much in common and have been in contact ever since. She indicated that they get together a "couple times a year every year" to celebrate holidays. The applicant submitted a copy of a photograph identified as depicting him with Ms. [REDACTED]. The letter from [REDACTED] is lacking in detail regarding the events and circumstances of the applicant's residence in the United States that would tend to lend credibility to her claim that she has direct, personal knowledge of the applicant's residence. She provided little relevant, verifiable information, such as, for example, where the applicant lived and worked during the requisite period. The lack of detail is significant, considering that the affiant claims to have a friendship with the applicant spanning more than 20 years. The letter from [REDACTED] can only be afforded limited weight as corroborating evidence of the applicant's residence since 1984, due to its lack of detail.

The applicant was subsequently interviewed under oath by a CIS officer on January 24, 2006. At the time of his interview the applicant indicated that he traveled from Malaysia to Toronto, Canada in August 1980 and then took a tour bus to the United States, which brought him to Flushing, New York. According to the notes taken by the officer, the applicant was asked whether he has the original passport bearing an entry stamp, and if not, what happened to it. The officer indicated that the applicant responded that he "has [the] expired passport but did not bring it." The applicant was also questioned regarding his absences from the United States. He indicated only one trip outside the United States during the requisite period, in July 1987. The applicant testified that he was married in Malaysia in November 1978 and that his wife came to the United States in 1989. Finally, the applicant indicated that he has five children born in Malaysia in April 1979, October 1980, June 1982, July 1985 and June 1987.

The district director issued a NOID to the applicant on May 17, 2006. The director advised the applicant that he had failed to submit credible documents or affidavits which would establish his residence in the United States by a preponderance of the evidence. The director emphasized that the birth dates the applicant provided for his children appear to be inconsistent with his testimony regarding his absences from the United States, suggesting that he returned to Malaysia in 1981 and 1984. The director further noted that the applicant was advised on his interview appointment notice that he should bring all passports and Form I-94s showing initial entry into the United States. The director noted that the applicant stated that he was in possession of an additional passport which he did not bring "as required." Finally, the director noted that it seemed "highly unlikely" that a tour bus dropped the applicant off in Flushing, New York, as stated by the applicant.

Counsel for the applicant submitted a letter in response to the NOID on June 14, 2006. Counsel stated that there was nothing to support the director's findings in the NOID that the documentation submitted by the applicant lacked credibility or accuracy. Counsel stated that the applicant responded to each question posed to him during his interview to the best of his recollection, including the dates of his travel to Malaysia. Specifically, counsel stated "To the extent that they may not have precisely coincided with the births of one or more of his children should not adversely reflect upon his credibility or recall of events."

Counsel further disputed the director's statement that the applicant was "required" to bring his expired to his interview. Counsel further stated that "the applicant indicated that he had once been in possession of one, but that he no longer possessed same." Finally, counsel asserted that the director provided no basis for his opinion that it "seems highly unlikely" that the applicant was transported by tour bus to Flushing, New York. Counsel concluded that the director had failed to "give latitude to the testimonial credibility of the applicant" in light of the passage of time.

The applicant also submitted photocopies of six photographs in rebuttal to the NOID. Two photographs show a man who appears to be the applicant with a woman in New York City, and a third photograph, depicts the applicant at Niagra Falls. The applicant indicated that all three photographs were taken in June 1981. The remaining three photographs were not accompanied by any information regarding the dates or locations on which they were taken. They also appear to show the applicant with a woman at various landmarks. The dated photographs have some probative value in establishing the applicant's presence in New York in June 1981. However, as discussed further below, there is a lack of other corroborating

evidence establishing his continuous residence in the United States for the duration of the requisite period and the photographs alone do not support the applicant's claim.

Finally, the applicant submitted a photocopy of an envelope addressed to the applicant at a post office box in Flushing, New York. The envelope bears Malaysian postage. The date on the postmark is June 27, 1987; however, it appears that the numbers "8" and "7," which are noticeably larger than the "19," were handwritten. Since it cannot be determined what date was indicate on the original postmark stamp, this evidence has no probative value.

The director denied the application on August 27, 2006. In denying the application, the director acknowledged counsel's response to the NOID, but determined that counsel's assertions did not constitute evidence or otherwise overcome the issues mentioned in the NOID. The director further found the six photographs submitted were "not dated or verifiable." The director concluded that the applicant has failed to meet his burden of proof in the proceeding.

On appeal, the applicant reiterates many of the assertions made by counsel in response to the NOID. With respect to the "contradictions in testimony" related to his home visits to Malaysia, he states that he answered to the best of his recollection, and that his credibility should not be doubted simply because the dates of his travel did not "precisely coincide" with the births of his children. He maintains that he testified during his interview that he was once in possession of his previous passport, but that he no longer had it. The applicant clarifies that he surrendered his passport to the Malaysian Embassy when he renewed his passport. Finally, he states that his photographs are "very important evidence" to prove his residence in the United States. He states that although his camera did not have a date feature, the backgrounds on the photographs show that he was in the United States. The applicant contends that his application satisfies the standards of Section 245A of the Act pursuant to the CSS/Newman Settlement agreements, and that the director failed to adequately consider all relevant documents received.

Upon review, the applicant has not established by a preponderance of the evidence that he continuously resided in the United States for the duration of the requisite period.

As noted above, the regulations allow the applicant to submit a broad range of documents to satisfy his burden of proof. See 8 C.F.R. § 245a.2(d)(3). The relevant evidence submitted by the applicant included: (1) one general affidavit from an individual who claims to have known him only since February 1984; (2) one funds transfer receipt dated September 1986; (3) one photocopy of an envelope mailed to the applicant in 1988, which may or may not have fallen within the requisite period; and (4) three photographs that appear to place the applicant in the United States in 1981. The applicant has not submitted any corroborating evidence of his residence or presence in the United States for the years 1982 or 1983, therefore his claim of *continuous* residence is based solely on his own statements made on his Form I-687 and during his interview with a CIS officer. To meet his burden of proof, an applicant must provide evidence of eligibility apart from his own testimony. 8 C.F.R. § 245a.2(d)(6). For this reason alone, the applicant has failed to meet his burden of proof. Furthermore, as discussed, the applicant's claim with respect to his residence during 1984, 1985 and 1987 is corroborated only by the affidavit from [REDACTED], which, for the reasons discussed above, has limited probative value.

The AAO does note that rather than focusing on the deficiencies in the evidence submitted, the district director placed undue emphasis on the applicant's failure to submit an expired passport that he may or may not have in his possession. Counsel for the applicant correctly stated that there is no requirement that an application for temporary resident status submit an expired passport in support of his application, and the AAO has not considered this issue in conducting its de novo review of the record. The district director also inappropriately speculated as to whether a tour bus would have dropped the applicant off in Flushing, New York. The director should focus on applying the statute and regulations to the facts presented by the record of proceeding, rather than relying on unfounded opinions or speculation. Nevertheless, the district director's actions must be considered to be harmless error as 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.12(f). Moreover, the district director did in fact advise the applicant in the NOID that he had failed to submit credible documents or affidavits to establish his residence in the United States during the requisite period, and she therefore had a legitimate basis for the denial of the application.

Regarding the director's findings with respect to the applicant's children born in Malaysia during the relevant period and the doubt cast on the credibility of the applicant's testimony, the AAO acknowledges the applicant's statement that he provided the dates of his travel abroad to the best of his recollection. Given the lack of any evidence to corroborate the applicant's claim that he continuously resided in the United States during 1982 and 1983, and the minimal evidence submitted related to the remainder of the requisite period, there was more than sufficient basis to deny the application on purely evidentiary grounds.

However, the fact remains that the applicant has consistently stated under oath and under penalty of perjury that he only left the United States in July 1987. He testified that he was married in 1978 and that his wife came to the United States in 1989. He also testified that he has children born in Malaysia in June 1982, July 1985, and June 1987. The director did have adequate reason to question the applicant's testimony regarding his absences from the United States, and he gave the applicant an opportunity to clarify the testimony. It is noted that the applicant has not indicated any other dates of travel to Malaysia during the relevant time period, or provided any other explanation on appeal, so this apparent discrepancy remains.

In conclusion, the absence of sufficient supporting documentation to corroborate the applicant's claim of continuous residence for the entire requisite period seriously detracts from the credibility of this 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. Given the paucity of the evidence in the record and the applicant's failure to provide evidence apart from his own testimony for significant portions of the statutorily relevant time period, it is concluded that he has failed to establish continuous residence in an unlawful status in the United States for the requisite period 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.