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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

[REDACTED]

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FILE: [REDACTED]
MSC 04 329 11241

Office: NEW YORK

Date: **JUL 01 2008**

IN RE: Applicant: [REDACTED]

PETITION: 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 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.

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, New York, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The district 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 Citizenship and Immigration Services or CIS) in the original legalization application period between May 5, 1987 to May 4, 1988. The district director further determined that the applicant was not physically present in the United States in that period from November 6, 1986 through the date that he attempted to file the Form I-687 application with the Service in the original legalization application period between May 5, 1987 to May 4, 1988 because his admitted absence from this country in June and July of 1987 could not be considered as casual under section 245A(a)(3)(B) of the Immigration and Nationality Act (Act). In addition, the district director determined that the applicant was inadmissible under section 212(a)(9)(B)(i)(II) of the Act and had failed to overcome such ground of inadmissibility. Consequently, the district 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 denied the application.

On appeal, the applicant claims that the district director utilized a higher standard than that required under the law in analyzing documentation submitted in support of his claim of residence in the United States since prior to January 1, 1982. The applicant contends that he provided sufficient evidence to establish his residence in this country during the requisite period and the district director erred in requesting additional evidence that he could not obtain because he was an undocumented alien during the period in question. The applicant asserts that the district director violated the confidentiality provisions of section 245A of the Act by using evidence to deny his Form I-687 application.

The first issue to be examined in this proceeding is whether the applicant is inadmissible under Section 212(a)(9)(B)(i)(II) of the Act as a result of his return to the United States within ten years of having departed this country after accruing a year or more of unlawful presence in the United States country.

Section 212(a)(9)(B)(i)(II) of the Act states in pertinent part that any alien who: "has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible."

The record shows that the applicant has submitted multiple applications to the Service and its successor CIS including two separate Form I-687 applications, a Form I-589, Application for asylum and

Withholding of Removal, and a Form I-485 LIFE Act application as well as having been previously placed into removal proceedings.

The applicant claimed that he unlawfully resided in this country since as early as August 1980 through that date he was allowed to file his initial Form I-687 application on May 3, 1990. The applicant also acknowledged that he departed the United States and then reentered this country on more than one occasion during the course of his unlawful residence in the United States. In the notice of intent to deny issued on May 12, 2005, the district director determined that the applicant's departures from and subsequent reentries into this country in this period rendered him inadmissible under section 212(a)(9)(B)(i)(II) of the Act. In response, the applicant submitted a Form I-690, Application for Waiver of Inadmissibility pursuant to Section 245A of the Act, in an attempt to overcome the ground of inadmissibility cited by the district director. The record shows that the district director denied the Form I-690 waiver application on June 13, 2005. The district director noted that the Form I-690 waiver application had been denied and concluded the applicant remained inadmissible under section 212(a)(9)(B)(i)(II) of the Act in denying the Form I-687 application on the same date.

This portion of the district director's decision shall be withdrawn. For purposes of section 212(a)(9)(B)(i)(II) of the Act, CIS has designated legalization applicants for lawful temporary residence to be in authorized status during the pendency of their applications through an administrative appeal.

The next issue to be examined in this proceeding is whether the applicant was physically present in the United States in that period from November 6, 1986 through the date that he attempted to file the Form I-687 application with the Service in the original legalization application period between May 5, 1987 to May 4, 1988.

An applicant for temporary resident status must establish continuous physical presence 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).

An alien shall not be considered to have failed to maintain continuous physical presence in the United States by virtue of brief, casual, and innocent absences from the United States. Also, brief, casual, and innocent absences from the United States are not limited to absences with advance parole. Brief, casual, and innocent absence(s) as used in this paragraph means temporary, occasional trips abroad as long as the purpose of the absence from the United States was consistent with the policies reflected in the immigration laws of the United States. Section 245A(a)(3) of the Act and 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. Paragraph 11, page 6 of the CSS Settlement Agreement and paragraph 11, page 10 of the Newman Settlement Agreement.

As noted above, the applicant acknowledged that he had been absent from the United States on multiple occasions including an absence of thirty-three days from June 16, 1987 to July 19, 1987 when he traveled to Pakistan. The record contains a Form I-589 asylum application that is signed by the applicant and dated October 26, 1999. With the Form I-589 asylum application, the applicant included a separate statement in which he admitted that he joined the Pakistan Peoples Party in June of 1987 during his trip to Pakistan and that he was subsequently attacked in February of 1999 by individuals opposed to his political views. The applicant provided a membership card from this political party dated June 29, 1987 and affidavits in support of the Form I-589 asylum application. Within these supporting affidavits, at least one affiant made direct reference to an incident in which the applicant's car had been destroyed by fire by individuals opposed to his political views. A review of the record reveals that the applicant made reference to this same incident in which his car had been burned during the course of a credible fear interview conducted by a Service officer relating to his asylum claim on April 26, 1999.

In the notice of intent to deny issued on May 12, 2005, the district director determined that the applicant's level of political activity and ownership of a car in Pakistan during his admitted absence from this country in June and July of 1987 could not be considered as casual. Consequently, the district director concluded that the applicant's absence from the United States in 1987 could not be considered as a brief, casual, and innocent absence from this country under section 245A(a)(3)(B) of the Act. However, the testimony contained in the record relating to the applicant's ownership of an automobile refers to an incident that happened in 1999 rather than an event that occurred during the course of his trip to Pakistan in 1987. Further, it cannot be concluded that either the ownership of a motor vehicle or participation in the political process are extraordinary activities but instead are normal and typical events that are a part of adult life.

This portion of the district director's decision shall also be withdrawn. For purposes of section 245A(a)(3)(B) of the Act, the applicant's absence of thirty-three days from June 16, 1987 to July 19, 1987 when he traveled to Pakistan must be considered to be brief, casual, and innocent.

The final issue to be examined in this proceeding is whether the applicant has submitted sufficient credible evidence to meet his or her burden of establishing continuous unlawful residence in the United States during the requisite period. Here, the applicant has failed to meet this burden.

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).

An alien applying for adjustment of status 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 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 record shows that the applicant submitted a Form I-687 application and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet, to CIS on August 24, 2004. 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 indicated he resided at [REDACTED] in Astoria, New York from August 1980 to April 1987 and [REDACTED] in Astoria, New York from May 1987 to September 1989. At part #31 of the Form I-687 application where applicants were asked to list all affiliations or associations with clubs, organizations, churches, unions, businesses, etc., the applicant listed "NONE." Further, at part #32 of the Form I-687 application where applicants were asked to list all absences from the United States since entry, the applicant listed only one absence from this country during the requisite period when he traveled to Pakistan for a family visit from June 1987 to July 1987.

In an attempt to establish continuous unlawful residence in this country since prior to January 1, 1982, the applicant submitted an affidavit dated August 20, 2004 that is signed by [REDACTED] r. Mr. [REDACTED] stated that he had known the applicant for more than thirty-five years as they both came from the same area of Pakistan. Mr. [REDACTED] noted that he had lived and worked in the United States for over twenty years and that once the applicant arrived in this country they maintained contact as the applicant moved from New York to Chicago to Atlantic City. Mr. [REDACTED] asserted that he presently saw the

applicant at least once a week on Fridays at the local mosque. While [REDACTED] provided the general locale of the applicant's residences in this country since the applicant purportedly arrived in the United States, he failed to offer any specific and verifiable testimony to substantiate the applicant's claimed residence in this country since prior to January 1, 1982.

The applicant included an affidavit signed by [REDACTED] who declared that he had known the applicant since childhood because he and the applicant grew up together in the same area and city in Pakistan and had attended the same high school. Mr. [REDACTED] contended that he and the applicant maintained contact through common friends after the applicant arrived in the United States in 1980. Mr. [REDACTED] indicated that his friendship with the applicant grew stronger after the applicant moved to Atlantic City, New Jersey and that he currently saw the applicant every week on Fridays at the local mosque. However, [REDACTED] failed to provide any direct and relevant testimony to corroborate the applicant's claim of residence in this country for the requisite period.

The applicant provided an affidavit dated August 20, 2004 that is signed by signed by [REDACTED]. Mr. [REDACTED] stated that he had known the applicant since childhood as he and the applicant were from the same area in Pakistan and had attended the same high school. Mr. [REDACTED] indicated that his friendship with the applicant became stronger after the applicant moved to Atlantic City, New Jersey and that he presently saw the applicant at least once every week on Fridays at the local mosque. Nevertheless, [REDACTED] failed to offer any specific, pertinent, and verifiable information that would tend to substantiate the applicant's claim of residence in this country for the period in question.

All three affiants discussed in the previous paragraphs, [REDACTED], and [REDACTED], testified that they regularly saw the applicant on a weekly basis on Fridays at their local mosque since he had moved to the Atlantic City, New Jersey area. However, it must be noted that the applicant has never claimed in any testimony, document, or application contained in the record that he was associated or affiliated with any mosque since he purportedly began his residence in this country prior to January 1, 1982 up through the date of this decision.

The applicant made a claim to class membership in a legalization class-action lawsuit and as such, was permitted to file a Form I-687 application on May 3, 1990. Within this Form I-687 application and his own accompanying affidavit, the applicant provided the same testimony on the Form I-687 subsequently filed on August 24, 2004 regarding the date he began residing in this country, his addresses of residence, his affiliations and associations, and his sole claimed absence from this country during the requisite period. The applicant acknowledged that he had been absent from the United States for thirty-three days from June 16, 1987 to July 19, 1987 when he traveled to Pakistan to visit family on the accompanying affidavit. Although the applicant also included an affidavit signed by [REDACTED] who noted that the applicant departed this country for Pakistan on June 16, 1987, [REDACTED] failed to provide any additional pertinent and substantive testimony relating to the applicant's residence in the United States for the requisite period.

The record shows that the applicant subsequently applied for admission to the United States at Dulles International Airport in Virginia on April 16, 1999. The record contains a Form I-867A, Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act, which reflects questions asked by a Service officer and answers provided by the applicant on such date. During the

course of this interview the Service officer asked the applicant, "When did [you] initially enter the United States?" In response, the applicant answered, "July of 1981." The applicant's testimony that he first arrived in this country in July 1981 conflicted with his testimony that he initially entered this country in August 1980 in both of the Form I-687 applications contained in the record as well as the accompanying affidavit included with the Form I-687 application filed on May 3, 1990.

The record further shows that the applicant subsequently appeared at the Service's District Office in Arlington, Virginia on April 26, 1999. The record contains a Form I-870, Record of Determination/Credible Fear Worksheet, which reflects questions asked by a Service officer and answers provided by the applicant on such date. The record shows that the applicant initially testified that he left Pakistan in 1981 and went to Turkey before entering the United States. Later in the interview the Service officer asked the applicant, "When did you first arrive in the United States?" In response, the applicant answered, "1987." The fact that the applicant once again provided conflicting testimony regarding the date he first entered this country seriously undermined the credibility of his claim of continuous residence in the United States for 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 visa petition. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In the notice of intent to deny issued on May 12, 2005, the district director questioned the veracity of the applicant's claimed residence in the United States since prior to January 1, 1982 by noting that he had failed to submit sufficient credible evidence of residence. In addition, the district director noted that the applicant had provided contradictory testimony relating to his claim of residence in this country for the requisite period at the interviews cited above on April 16, 1999 and April 26, 1999. Although the district director noted that the applicant had admitted that he did not enter this country until 1989 in removal proceedings on August 3, 2000, such conclusion appears to be based upon an off the record conversation between the applicant, his prior attorney, and the Immigration Judge conducting the hearing. The official transcript of the hearing conducted on August 3, 2000 does not contain any admission or testimony by the applicant regarding the date he first entered the United States. Regardless, the district director's conclusions regarding the effect of testimony provided by the applicant during removal proceedings on August 3, 2000 must be considered as 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.2(b). The applicant was granted thirty days to respond to the notice.

In response, the applicant submitted a new affidavit signed by [REDACTED], the same individual who had previously provided an affidavit in support of the applicant's claim of residence in the United States for the requisite period. Mr. [REDACTED] reiterated his prior testimony that he was a close family friend of the applicant as they had previously known each other in Pakistan. Mr. [REDACTED] now testified that it was the applicant who met him and picked him up at John F. Kennedy Airport in New York when he arrived in this country for the first time in March 1986. Mr. [REDACTED] declared the applicant was living in Astoria, New York in Queen's County and working construction in New

York at the time of and subsequent to his arrival in the United States. Mr. [REDACTED] indicated that he and the applicant continued to meet and socialize during this period. However, [REDACTED] failed to attest to the applicant's residence in this country from prior to January 1, 1982 through the date he himself initially arrived in the United States in March 1986. Furthermore, [REDACTED] failed to provide any explanation as to why he had not provided testimony relating to the applicant's place of residence and employment in his previous affidavit if in fact he possessed such detailed knowledge relating to the applicant at the time he executed this prior affidavit on August 20, 2004.

The applicant included an affidavit signed by [REDACTED] who noted that he had known the applicant since 1980 as the applicant had been a regular customer at his restaurants, initially [REDACTED] and then [REDACTED] in Jackson Heights, New York. Nevertheless, [REDACTED] failed to provide any specific and verifiable information to confirm the applicant's claimed residence in the United States during the requisite period.

The applicant provided an affidavit that is signed by [REDACTED]. Mr. [REDACTED] stated that he had previously known the applicant in Pakistan and met him for the first time in the United States in December 1980 at the mosque in the Islamic Center at Riverside Drive and 72nd Street in New York. [REDACTED] noted that he and the applicant continued to meet, pray at the mosque, have meals together, and socialize after such date. Mr. [REDACTED] indicated that the applicant worked in construction during this period. However, as previously discussed, the applicant has never claimed in any testimony, document, or application contained in the record that he was associated or affiliated with any mosque since he purportedly began his residence in this country prior to January 1, 1982 up through the date of this decision.

The district director determined that the applicant had failed to submit sufficient credible evidence establishing his continuous residence in this country since prior to January 1, 1982, and, therefore, denied the Form I-687 application on June 13, 2005.

On appeal, the applicant claims that the district director utilized a higher standard than that required under the law in analyzing documentation submitted in support of his claim of residence in the United States since prior to January 1, 1982. However, the applicant fails to address any of the conflicts and contradictions in his own testimony that have been discussed above relating to the date he purportedly entered this country for the first time. In light of the minimal probative value of the evidence contained in the record, the applicant's assertion that any higher burden of proof was utilized in the denial of the Form I-687 application other than the accepted preponderance of the evidence enunciated in *Matter of E-M-*, 20 I&N Dec. at 79-80 is without merit.

The applicant contends that he provided sufficient evidence to establish his residence in this country during the requisite period and the district director erred in requesting additional evidence that he could not obtain because he was an undocumented alien during the period in question. While it is acknowledged that it may be difficult to obtain supporting documentation relating to a period when the applicant was purportedly residing in this country as an undocumented alien, such status is insufficient to explain the fact that the evidence in the record lacks sufficient detailed verifiable information to corroborate the applicant's claim of residence in the United States for the requisite period.

The applicant asserts that the district director violated the confidentiality provisions of section 245A of the Act by using evidence to deny his Form I-687 application. However, the confidentiality provisions of section 245A of the Act do not allow evidence submitted in support of the Form I-687 application to be utilized against the applicant in any separate application, petition, or proceeding other than a determination of the applicant's eligibility to adjust to both temporary and permanent residence under section 245A of the Act. Such confidentiality provisions do not apply to evidence and testimony provided in separate and unrelated applications, petitions, and proceedings to determine an applicant's eligibility for benefits pursuant to other sections of the Act.

The absence of sufficiently detailed supporting documentation and the applicant's own conflicting and contradictory testimony regarding the date he first entered the United States seriously limits the credibility of his claim of residence in this country for the requisite period. 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 to May 4, 1988 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).

Given the applicant's reliance upon documents with minimal or no probative value, it is concluded that he has failed to establish continuous residence in an unlawful status in the United States from prior to January 1, 1982 through May 4, 1988 as required under section 245A(a)(2) of the Act. 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.