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U.S. Citizenship
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FILE: [REDACTED]
MSC-05-312-14127

Office: MIAMI

Date: **JUL 15 2008**

IN RE: Applicant: [REDACTED]

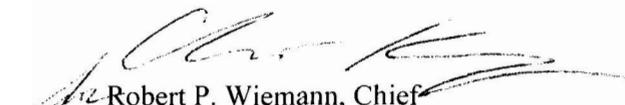
APPLICATION: Application for Status as a Temporary Resident pursuant to Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:



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, Miami, Florida. 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. Specifically, the director stated that though the applicant submitted two affidavits, both from [REDACTED] in support of his claim of having resided in the United States for the duration of the requisite period, these affidavits were not sufficient to meet the applicant's burden of proof. Therefore, the director determined the applicant was not eligible to adjust to temporary resident status pursuant to the CSS/Newman Settlement Agreements and denied the application.

On appeal, the applicant asserts that he is appealing the director's decision because the director did not accord due weight to the evidence he previously submitted. He submits additional evidence in support of his application.

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) 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 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 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.

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

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 8, 2005. 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 showed his address in the United States during the requisite period to be [REDACTED] in Ft. Pierce, Florida where he resided from October 1981 until February 1988. At part #32 where the applicant was asked to list all of his absences from the United States, he indicated that he has been absent from the United States twice since he first entered. He stated that his first absence was from February to March in 1987 and that his second absence was from February 1988 to July 2002. At part #33, where the applicant was asked to list all of his employment in the United States since he first entered, he showed that he was not employed during the requisite period. It is noted that the applicant was a minor for the duration of that period.

Also in the record is a photocopy of the applicant's passport. This document indicates that the applicant's passport was issued to him on April 17, 2003 in Ahmedabad, which is located in Gujarat, India. This indicates that the applicant was present in India in April 2003 to obtain this passport. This passport indicates that the applicant's address at the time this passport was issued in April 2003 was on [REDACTED] near the Mahadev Temple in Attanadiad, Kheda, India. However, the applicant did not indicate that he was absent from the United States at any point in time after he re-entered in July 2002. He indicated that he resided in the United States in 2003. This casts doubt on whether the applicant has fully represented his absences from and residence in the United States both during and subsequent to the requisite period.

Doubt cast on any aspect of the applicant's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. 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 applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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. 8 C.F.R. § 245a.2(d)(5). To meet his burden of proof, an applicant must provide evidence of eligibility apart from his or her own testimony. 8 C.F.R. § 245a.2(d)(6). The regulation at 8 C.F.R. § 245a.2(d)(3) provides an illustrative list of documentation that an applicant may submit 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. An applicant may also submit any other relevant document 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, in pertinent part: that letters from employers should be on the employer letterhead stationary, if the employer has such stationary and must include the following: an applicant's address at the time of employment; the exact period of employment; periods of layoff; duties with the company; whether or not the information was taken from the official company records; and where records are located and whether the Service may have access to the records. The regulation further provides that if such records are unavailable, an affidavit form-letter stating that the alien's employment records are unavailable and noting why such records are unavailable may be accepted in lieu of statements regarding whether the information was taken from the official company records and an explanation of where the records are located and whether USCIS may have access to those records. This affidavit form-letter shall be signed, attested to by the employer under penalty of perjury, and shall state the employer's willingness to come forward and give testimony if requested.

In support of his application, the applicant submitted the following documentation that is relevant to the requisite period:

- An affidavit from [REDACTED] that was notarized on July 5, 2005. The affiant states that he owned rental properties in Fort Pierce, Florida from approximately 1980 to 1990. He asserts that the applicant's parents were his tenants and that they resided at [REDACTED] in Fort Pierce, Florida from October 1981 until February 1988. He states that they paid rent on a monthly basis. He states that he has no records available other than his affidavit to confirm the applicant's family's residence in this property. However, he fails to indicate how he is able to confirm the applicant's residence in his rental property in absence of such records. Though the affiant states that the applicant was his tenant, he does not state the frequency with which he saw the applicant during the requisite period or indicate whether there were periods of time when he did not see the applicant. Because this affidavit is significantly lacking in detail, it carries only very minimal weight as evidence that the applicant's family resided in the United States during the requisite period.
- A second affidavit from [REDACTED] that was notarized on July 5, 2005. In this affidavit, the affiant states that he employed the applicant's father. He asserts that he hired the applicant's father in October 1981 and that the applicant's father worked for him harvesting citrus until February 1988. He states that he paid the applicant's father on a weekly basis and that he does not have any records available. He does not indicate how he can confirm the applicant's father's dates of employment in the absence of such records. The affiant fails to state whether there were periods of unemployment during the applicant's father's time working for him. Because this letter is lacking with regards to the criteria that the regulation at 8 C.F.R. § 245a.2(d)(3)(i) states employment letters must adhere to, this affidavit can only be accorded very minimal weight as proof that the applicant's father worked in the United States during the requisite period.

The director denied the application for temporary residence on November 27, 2006. In denying the application, the director stated that when she considered both his testimony taken at the time of his interview with a CIS officer and the evidence in the record, the applicant failed to meet his burden of proving that he resided continuously in the United States for the duration of the requisite period. The director stated that the applicant failed to meet his burden for the reasons noted in her decision and in her Notice of Intent to Deny (NOID). However, the AAO notes that this statement appears to have been made in error, as the record does not show that this applicant was issued a NOID.

However, 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 indicates that the applicant was issued a Notice of Intent to Deny (NOID).

On appeal, the applicant’s attorney argues that the director did not accord due weight to evidence previously submitted in support of his application. He resubmits his previously submitted affidavits and submits the following additional evidence in support of his application:

- A brief submitted by Counsel which asserts the following:
 - That [REDACTED] owned the property where the applicant resided during the requisite period and employed the applicant’s father at that time. He further states that the affidavits submitted from [REDACTED] were not accorded due weight.
 - That at the time of the applicant’s interview with a CIS officer, the officer refused to accept additional evidence in support of the application. He states that he is now submitting that evidence.
 - That at the time of the applicant’s interview with a CIS officer pursuant to his Form I-687 application, he brought witness [REDACTED] to testify on his behalf who stated that she met the applicant in 1987.
 - That the applicant’s father was front desked before he returned to India in February 1988.
 - That CIS erred by not sending a NOID to the applicant before issuing its final decision.
- An affidavit from [REDACTED] that was notarized on November 9, 2006. The affiant states that he knows that the applicant was physically present in the United States in October 1981 and until February 1988. He states that he first met the applicant and his parents in India. He further states that the applicant and his parents stayed with him in his motel, the Open Gate Motel, in Tampa, Florida and that he can confirm the date that the applicant’s family stayed at the hotel because their stay coincided with the birth of his daughter, [REDACTED], on October 15, 1981. He asserts that the applicant stayed in his motel for four to six days and then moved to Ft. Pierce, Florida. He states that occasionally the affiant and his family visited the affiant’s home in Tampa. He states that they visited him in April 1984 after his son was born and that the applicant’s father worked in a farm in Ft. Pierce, Florida. He states that the applicant’s family attempted to apply for legalization but was turned away and that the family returned to India after that time. It is noted that though this affiant indicates that he is enclosing proof of the dates of his children’s birth and proof of his own residency in the United States, he fails to include such proof. The affiant failed to indicate the frequency with which he saw the applicant during the requisite period other than to say that he saw him occasionally.

Further, he did not state whether there were periods of time when he did not see the applicant during the requisite period. Because this affidavit is lacking in detail, it can only be accorded minimal weight as proof that the applicant resided in the United States for the duration of the requisite period.

- An affidavit from [REDACTED] that was notarized on November 10, 2006. The affiant states that he or she has resided in Florida since June 1981. The affiant states that he or she knows that the applicant was physically present in the United States in October 1981 because he or she met them at a social gathering hosted by [REDACTED] in October 1981. The affiant states that he or she was in touch with the applicant's family through Mr. [REDACTED] and therefore knows that the applicant stayed in the United States until February 1988. The affiant states that he or she was not close friends with the applicant's family, but that he or she knows that the applicant resided in the United States from October 1981 until February 1988. Though the affiant states that she saw the applicant during social gatherings during the requisite period, she does not indicate the frequency with which she saw the applicant at these gatherings. He or she fails to state whether there were periods of time during the requisite period when he or she did not see the applicant. Because this affidavit is lacking in detail, it can only be accorded minimal weight as proof that the applicant resided in the United States for the duration of the requisite period.

The AAO has reviewed all of the evidence submitted by the applicant in support of his application and has determined that though the applicant submitted evidence in support of his claim of having maintained continuous residence in the United States during the requisite period, this evidence is not sufficient to allow him to meet his burden of proof. None of the affiants from whom the applicant has submitted affidavits state the frequency with which they saw the applicant during the requisite period. They do not state whether there were periods of time when they did not see the applicant. This omission is significant because the applicant's passport in the record indicates that the applicant had at least one absence from the United States that he did not show on his Form I-687.

It is noted that in his brief the applicant's attorney has argued on appeal that CIS erred when it did not issue a NOID to the applicant before denying the application. However, it is also noted that the director was not required to issue a NOID to the applicant. Rather, pursuant to paragraph 7, page 4 of the CSS Settlement Agreement and paragraph 7, page 7 of the Newman Settlement Agreement, the director shall issue a NOID before denying an application for class membership. Here, the director adjudicated the Form I-687 application on the merits. As a result, the director is found not to have denied the application for class membership and was therefore not required to issue a NOID prior to issuing the final decision in this case. Therefore, the AAO finds that the director did not err in this case.

In this case, the absence of credible and probative documentation to corroborate the applicant's claim of continuous residence for the requisite period, as well as the inconsistency regarding the

applicant's absences previously noted, seriously detract 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. Given the inconsistencies in the record and the lack of credible supporting documentation, it is concluded that the applicant has failed to establish by a preponderance of the evidence that he has 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.