



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE: [REDACTED]
MSC 04 321 10383

Office: CHICAGO

Date: MAY 08 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:

[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 Acting District Director, Chicago. The appeal will be dismissed.

The acting district director denied the application because the applicant failed to demonstrate credibly that he entered the United States before January 1, 1982, and thereafter resided in a continuous unlawful status, and failed to demonstrate credibly that he was continuously physically present in the United States since November 6, 1986.

On appeal, counsel asserts that the evidence sufficiently demonstrates the applicant's eligibility. Counsel also alleges procedural error.

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 was filed. Section 245A(a)(2) of the Immigration and Nationality Act (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 confirm 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 resided continuously in the United States from January 1, 1982 until he or she filed his or her application, was continuously physically present in the United States from November 6, 1986 until the date of filing the application, 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). To meet his or her

burden of proof, an applicant must provide evidence of eligibility apart from the applicant's own testimony. 8 C.F.R. § 245a.2(d)(6).

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 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 (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.

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 applicant submitted the instant Form I-687 on August 16, 2004. The applicant stated on that form that he lived at [REDACTED], Brooklyn, New York, from May 1981 to October 1990. The applicant also claimed to have lived at an address in Miami and another address in Brooklyn before moving to Illinois in January of 1992.

The applicant further stated that he worked in Brooklyn, New York, as a construction helper from May 1981 to December 1984, but did not state his employer's name or address. He also stated that he worked for Manhattan Gift Shop, in Manhattan, New York, as a helper from January 1985 to September 1990.

The record contains:

- a copy of the applicant's Social Security Statement;
- a letter dated September 7, 1990 from the head Imam of Masjid al Salam, a mosque in Brooklyn, New York,;

- a letter dated October 9, 1990 from the vice president of Manhattan Gifts of New York, New York;
- an affidavit dated July 24, 1991 from [REDACTED]
- an affidavit dated July 24, 1991 from [REDACTED]
- an affidavit dated July 24, 1991 from a person whose name on that document is illegible; and,
- an undated letter that purports to be from the Pakistani Consulate in New York City,

The record contains no other evidence pertinent to the applicant's continuous residence or continuous physical presence in the United States during the salient periods.

The applicant's Social Security Statement shows taxed earnings during each year from 1991 to 2001, with the exceptions of 1997 and 2000, during which years that statement reports no taxed earnings. Although that statement purports to report the applicant's lifetime earnings in the United States, it shows no earnings prior to 1991.

In his September 7, 1990 letter, the head Imam of Masjid al Salam stated that the applicant has attended that mosque since 1987.

In his October 9, 1990 letter, the vice president of Manhattan Gifts stated that the applicant worked at that store from January 1985 through September 1990.

In his July 24, 1991 affidavit, [REDACTED] stated that from May 1981 to October 1990 the applicant lived with him at [REDACTED] New York, New York.

In his July 24, 1991 affidavit [REDACTED] stated that he knows that the applicant lived at 1145 [REDACTED] in Brooklyn from May 1981 to October 1990.

In the July 24, 1991 affidavit the affiant with the illegible name stated that the applicant lived at [REDACTED] in Brooklyn, New York, from May 1981 to October 1990.

On his previous Form I-687, which he signed on April 16, 2001, when asked to list all of his United States addresses since his first entry, the applicant stated that he then lived at [REDACTED] Chicago, Illinois, and had previously lived at [REDACTED] and [REDACTED] both also in Chicago, but did not list the dates at which he lived at those addresses. The applicant did not state that he had ever lived at [REDACTED] or anywhere else in New York, or anywhere in the United States other than Chicago, since his first entry into the United States, notwithstanding that on the instant Form I-687, he stated that he lived at [REDACTED] Brooklyn, New York, from May 1981 to October 1990, then lived in Miami, Florida, and then in Brooklyn again before moving to Illinois in 1992.

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. Further, the applicant must resolve any inconsistencies in the record with competent, independent, objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

Further, on the April 16, 2001 Form I-687, the applicant indicated that he had never held a job in the United States prior to working for Manhattan Gifts in January 1985. This office notes that this employment history conflicts with the history the applicant provided on the instant Form I-687, in which he stated that he worked as a construction helper in New York from May 1981 to December 1984.

The record also shows that on May 1, 1996 the applicant was arrested, in Alsip, Illinois, for a violation of 720 Illinois Compiled Statutes section 5/12-2(a)(1), aggravated assault with a firearm, to wit: a shotgun, and two counts of violating a city regulation. (Case number [REDACTED]) Although the disposition of that arrest is not, in itself, in the record, the record contains an order of expungement dated May 11, 2000. In the absence of court documents indicating the final disposition of the charges, the AAO will not make a determination as to the applicant's inadmissibility due to a criminal conviction. However, the expungement order does indicate that the applicant was convicted on the charge of aggravated assault with a firearm. Any rehabilitative action that overturns a state conviction is ineffective to expunge a conviction for immigration purposes. *Matter of Roldan*, 22 I&N Dec. at 523, 528. Therefore, the applicant remains "convicted" of the offense cited above for immigration purposes.

On the applicant's previous Form I-687, however, which he signed and certified on April 16, 2001 under penalty of perjury, the applicant stated, at item 40, that he had never been arrested. This contradiction again raises the issue of the accuracy of the applicant's assertions.

The undated letter that is ostensibly from the Pakistani Consulate states that the applicant was issued a passport on March 11, 1981 in Pakistan on which he traveled to the United States.

In a Notice of Intent to Deny (NOID), dated April 21, 2006, the acting director stated that the evidence the applicant submitted was insufficient to demonstrate his continuous residence and continuous physical presence in the United States during the requisite periods. The acting director indicated that CIS intended, therefore, to find the applicant ineligible for temporary resident status pursuant to Section 245A of the Act. The applicant was accorded 30 days to respond to that notice.

In response, counsel submitted no additional evidence but asserted that the evidence submitted is sufficient to establish the applicant's eligibility.

In the Notice of Decision, dated June 6, 2006, the acting director denied the application based on the reasons stated in the NOID, which is that the applicant had failed to credibly demonstrate continuous residence and continuous physical presence in the United States during the requisite periods.

On appeal, counsel submitted no additional evidence, but again asserted that the evidence submitted is sufficient. Counsel also noted that, pursuant to the settlement agreement in *Catholic Social Services, Inc., et al., v. Ridge, Id.*, the acting director is obliged, when issuing a denial of class membership, to inform the applicant of his right to seek review of the denial by a Special Master, and the acting director did not inform the applicant of that right in this case.

Counsel's reading of that agreement is correct, but it has no application in the instant case. The right to appeal to a Special Master is limited to denials of class membership. The acting director did not find that the applicant is not qualified for class membership. Rather, the acting director denied the application based on a finding that the evidence submitted did not demonstrate that he had resided and been physically present in the United States during the requisite periods. Such a decision may not be appealed to a Special Master. This office is the correct venue for such an appeal, as the acting director stated in the decision of denial.

One issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate entry into the United States prior to January 1, 1982, and continuous residence during the requisite period.

Another issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that he was continuously physically present in the United States since November 6, 1986, excepting casual, and innocent absences excused by 8 U.S.C. § 1255a(a)(3).

The applicant has submitted contradictory employment histories to CIS. On the April 16, 2001 Form I-687, the applicant indicated that he had never held a job in the United States prior to working for Manhattan Gifts in January 1985. On the instant Form I-687 he stated that he worked as a construction helper in New York from May 1981 to December 1984.

Similarly, on his previous Form I-687 application the applicant stated that he has never lived anywhere in the United States prior to living in Chicago. In the instant Form I-687 application, the applicant stated that he lived at [REDACTED] Brooklyn, New York, from May 1981 to October 1990, then lived in Miami, Florida, and then in Brooklyn again before moving to Illinois in 1992.

The applicant raises issues of the credibility and reliability of his assertions and the evidence submitted to support them when he makes two contradictory employment claims and submits two contradictory versions of his residential history. The divergent histories provided suggest that the applicant is claiming to have resided and worked in the United States, and providing documentary evidence of those claims, during periods when he was not, in fact, present in the United States. Under these circumstances, the evidence submitted cannot credibly support the applicant's claims of continuous residence and continuous presence in the United States during the requisite periods.

The applicant is, for both reasons, ineligible for temporary resident status under section 245A of the Act. The application was correctly denied on those bases, which have not been overcome on appeal. The application will remain denied for the above stated reasons, with each considered as an

independent and alternative basis for denial. In legalization proceedings, the burden of proving eligibility for the benefit sought remains entirely with the applicant. 8 C.F.R. § 245a.2(d)(5). Here, that burden has not been met. The appeal will be dismissed.

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