

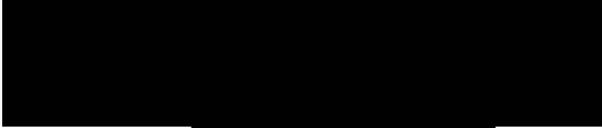
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

L1



FILE: [REDACTED]
MSC-05-230-11511

Office: CHICAGO Date: OCT 17 2008

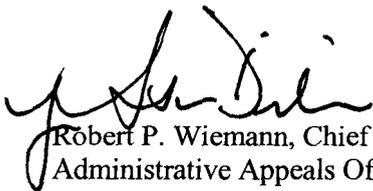
IN RE: Applicant: [REDACTED]

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: SELF-REPRESENTED

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, Chicago. 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 stated that the applicant's absence from the United States from June 1997 until November 14, 2000 and his subsequent lawful status in the United States caused him to fail to establish that he continuously resided in the United States in an unlawful status for the duration of the requisite period pursuant to the regulation at 8 C.F.R. § 245a.1(c)(1)(i). Therefore, the director determined that 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 the director failed to consider all of the documents he submitted 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 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 is eligible to adjust to temporary resident status and if he 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 May 18, 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 indicated his addresses in the United States during the requisite period were all in Brooklyn, New York as follows: [REDACTED] from October 1981 to December 1982; [REDACTED] from January 1983 to April 1984; and [REDACTED] from April 1984 to December 1988. At part #31 where the applicant was asked to list the churches with which he was associated or affiliated, he stated that he was affiliated with the Indian Christian Church in Queens, New York from November 1981 to December 1989. At part #32 where the applicant was asked to list all of his absences from the United States, he indicated that he was absent once during the requisite period, when he went to India for his sister’s marriage from August to September of 1987. At part #33, where the applicant was asked to list all of his employment in the United States since he first entered, he stated that during the requisite period he was employed as a cashier for Atlas Jewelers in New York from November 1981 to November 1988.

The record also contains a Form I-687 submitted by the applicant to establish class membership in 1990. This Form I-687 lists the applicant’s residences, absences and employment in the United States during the requisite period consistently with his subsequently filed Form I-687. However, of note, at part # 34, where the applicant was asked to list all of the churches and organizations that he was affiliated or associated with he stated that he had no such affiliations or associations.

The applicant has the burden of proving by a preponderance of the evidence that he 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 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 applicant submitted the following evidence that is relevant to his claim that he resided in the United States during the requisite period:

- An affidavit from the Asian Community Church that is signed by [REDACTED], who states that he is the pastor of the Asian Community Church and that he has known the applicant since 1984, when they met in a prayer meeting in a church in Queens, New York. He states that the pastor of that church told him that the applicant had been a participant of that church fellowship since 1981. He asserts that he visited the applicant on Green Avenue in Brooklyn, New York and that the applicant worked at Atlas Jewelers at that time. It is noted that the applicant stated that he had no affiliations with any churches on his 1990 Form I-687. When he was asked again to list his affiliations with churches on his 2005 Form I-687, he stated that he was affiliated with the Indian Christian Church in Queens, New York. However, he did not state that he was affiliated with the Asian Community Church on either Form I-687. This casts doubt on this affiant's claim regarding the applicant's membership in this church.
- A receipt issued to the applicant for payment of rent for an apartment on [REDACTED]. This receipt is dated December 3, 1987.
- A prescription for Amoxicillin issued to the applicant by [REDACTED] M.D. from Brooklyn, New York. This prescription was issued on April 9, 1984. It is noted that while the New York State Education Department Office of the Professions indicates that Hemant Patel is currently licensed to practice medicine in the United States under License number 169377, the date he became licensed to practice medicine was February 23, 1987.¹ Therefore, doubt is cast on whether this doctor could have prescribed medicine to the applicant prior to that date.
- An affidavit from [REDACTED], who indicates that he resides in Ontario, Canada. The affiant states that he visited New York in December 1981 and that while he was there, he stayed with the applicant in Brooklyn. He goes on to say that he knows that the applicant resided in the United

¹ See New York State Department of Education Office of the Professionals website at: <http://www.nysed.gov/coms/op001/opscr2?profcd=60&plicno=169377>

States, “for several years” since 1981. However, the affiant does not state whether he saw the applicant in the United States after December 1981 or indicate how he knows that the applicant resided continuously in the United States after that time.

- A statement from the applicant, who indicates that he was absent from the United States from August 24, 1987 to September 9, 1987.
- An affidavit from [REDACTED] that was notarized in India and indicates that the affiant currently resides in Bangalore, India. The affiant states that he is a former classmate of the applicant’s and that he is aware that the applicant and his wife left for the United States in 1981 and that they have resided in the United States since that time. Though this affiant states that he knows that the applicant has resided in the United States since 1981, he does not state whether he himself has ever personally seen the applicant in the United States. He further does not indicate whether he knows if the applicant continuously resided in the United States during the requisite period.
- A photocopy of an envelope addressed to the applicant in Brooklyn, New York that was postmarked on November 18, 1981. Though this envelope bears three Indian postage stamps, the AAO has found that each was issued subsequent to the postmark date on the envelope. Details of the issue dates of stamps found on this envelope are as follows:
 - One stamp in the amount of four rupees that shows the words, “painted stork.” This stamp is listed on page 841 of Volume three of the *Scott Standard Postage Stamp Catalogue* and is listed as catalog number 1910 A1287. The catalog lists the issue date of this stamp as September 20, 2001.
 - One stamp in the amount of two rupees that bears a painting of Sardar Vallabhbhai Patel. This stamp is listed on pages 838 and 839 of Volume three of the *Scott Standard Postage Stamp Catalogue* and is listed as catalog number 1823 1237a. The catalog lists the issue date of this stamp as October 31, 2000.
 - One stamp in the amount of one rupee that bears a painting of Subhas Chandra Bose. This stamp is listed on page 840 of Volume three of the *Scott Standard Postage Stamp Catalogue* and is listed as catalog number 1871 A1262. The catalog lists the issue date of this stamp as January 23, 2001.

In his decision, issued February 27, 2007, the director stated that the applicant’s absence from the United States from June 1997 until November 14, 2000 and his subsequent lawful status in the United States caused the applicant to fail to establish that he continuously resided in the United States in an unlawful status for the duration of the requisite period pursuant to the regulation at 8 C.F.R. § 245a.1(c)(1)(i). Therefore, the director determined that the applicant was not eligible to adjust to temporary resident status pursuant to the CSS/Newman Settlement Agreements and denied the application.

The AAO notes here that the director erred in this decision, as the requisite period ended when the applicant attempted to first file for legalization during the original filing period, which ended on May 4, 1988. The absence and subsequent lawful status noted by the director did not fall within the requisite period. Therefore, they did not cause the applicant to fail to maintain continuous unlawful residence during the requisite period.

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 therefore withdraws the director's statement that your lawful status from November 14, 2000 until January 31, 2004 caused you to fail to maintain continuous unlawful residence during the requisite period.

However, upon *de novo* review of the matter, the AAO found that the applicant submitted a photocopy of an envelope addressed to you in Brooklyn, New York that was postmarked on November 18, 1981. Though this envelope bears three Indian postage stamps, the AAO has found that each was issued subsequent to the postmark date on the envelope.

The fact the envelope is postmarked November 18, 1981 but bears stamps that were not issued until well after the postmark date that appears on top of the stamps establishes that the applicant utilized documents in a fraudulent manner and made material misrepresentations in an attempt to establish that he resided within the United States for the requisite period. By engaging in such an action, the applicant has seriously undermined his credibility as well as the credibility of his claim of continuous residence in this country 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).

On appeal, the applicant asserts that the director failed to fully consider the affidavits from [REDACTED] the medical prescription, the rent receipt, the affidavit of Pastor [REDACTED], the envelopes and the affidavit from [REDACTED] when she issued her decision.

The AAO has considered all of the evidence submitted by the applicant, including the evidence identified by the applicant with his appeal, and has found that he has failed to satisfy his burden of proof. Further, by submitting envelopes with fraudulent postmarks, the applicant has made a material misrepresentation of his dates of residence to gain the benefit of temporary resident status, thus casting doubt on his eligibility for this visa classification.

Section 212(a)(6)(C) of the Act provides:

Misrepresentation. – (i) In general. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Pursuant to the regulation at 8 C.F.R. § 103.2(b)(16)(i), the AAO notified the applicant of this derogatory information and provided him with an opportunity to respond in a NOID issued on September 23, 2008. In the NOID, the AAO afforded the applicant with 15 days within which to provide a response to this finding. Though the AAO sent the NOID to the applicant's address of record, it was returned to the AAO as undeliverable. Upon receipt of the returned correspondence, the AAO once again searched the applicant's record and confirmed that the address to which the NOID was sent continued to be the applicant's address of record. Therefore, the record is considered complete.

As the applicant has not overcome the AAO's determination that he willfully submitted documents in an attempt to procure immigration benefits through fraud and willful misrepresentation of a material fact, and this matter shall be referred to the U.S. Attorney for possible prosecution. See 8 C.F.R. § 245a.2(t)(4).

In summary, though the applicant provided evidence in an attempt to support his claim that he resided continuously in the United States for the duration of the requisite period, among this evidence was an envelope with a fraudulent postmark date. This submission of fraudulent documents in an attempt to gain an immigration benefit causes the applicant to be ineligible to adjust to temporary resident status. 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 previously noted submission of fraudulent documents by the applicant, it is concluded that the applicant has failed to establish by a preponderance of the evidence that he is either eligible to adjust to temporary resident status or 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.