

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

L1

PUBLIC COPY



FILE: MSC-06-055-11440

Office: NEW YORK

Date: SEP 02 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.

A handwritten signature in black ink, appearing to be "R. Wiemann".

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. Specifically, in her Notice of Intent to Deny (NOID), the director stated that the affidavits the applicant submitted in support of his application were not found credible or amenable to verification by her office. Therefore the director found the applicant failed to meet his burden of proof. The director granted the applicant 30 days within which to submit additional evidence in support of his application. Though the director noted that her office received additional evidence in support of the application in response to her NOID, her office did not find this new evidence to be credible. Because the applicant failed to provide sufficient, credible evidence in support of his application 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 submits a brief and additional evidence in support of his application. He argues that he has satisfied his burden of proof.

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 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 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 indicates that the applicant submitted a Form I-687 application and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet, to CIS on November 24, 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 to be: [REDACTED] in Staten Island, New York from November 1981 until July 1983; [REDACTED] in Jamaica, New York from July 1983 until August 1984; and [REDACTED] in Staten Island, New York from September 1984 until June 1988. At part #32 where he was asked to list all of his absences from the United States, he indicated that during the requisite period he was absent one time, when he went to see his grandfather in Sri Lanka from

January 10 until February 13, 1987. At part #33, where the applicant was asked to list all of his employment in the United States since he first entered, he indicated that he was not employed during the requisite period. Here, he indicated he was a student for the duration of that time. It is noted that the applicant was born on November 3, 1974. Therefore, he would have been six years old at the time he claims he first entered the United States in 1981 and 13 years old in May of 1988.

Also in the record is an affidavit submitted by the applicant that was notarized September 26, 2005. The applicant provides details regarding his first entry into the United States, which he states was through Canada on November 3, 1981. He further indicates that he resided with his mother from 1981 until July 1983 on [REDACTED] in New York. He states that after leaving that residence he moved to Jamaica, New York where he resided with his mother and her friend [REDACTED]. He goes on to say that he resided with this friend when he lived at [REDACTED] in Staten Island, New York. He provides details regarding his absence from the United States. He also states that he was educated at home by his mother. He states that he and his mother attempted to apply for legalization on August 12, 1987 but that they were turned away after his mother stated that she and the applicant were absent from the United States after they entered because traveled to Sri Lanka for a brief time.

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 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.

Here, the applicant initially submitted the following documents that are relevant to the requisite period with his Form I-687 application:

- An affidavit from [REDACTED] that was notarized on October 26, 2005. In this affidavit, the affiant states he is a Canadian Citizen. He states that he helped the applicant and his mother re-enter the United States through Canada in February of 1987.
- An affidavit from [REDACTED] that was notarized on April 21, 2006. The affiant submits a copy of his birth certificate indicating he was born in New York with his affidavit. The affiant states that he has known the applicant in 1981. He states he first met the applicant in November 1981 when his mother was looking for a cleaning job with his business and that thereafter he saw the applicant when he was with his mother while she was cleaning houses. He states that the applicant's mother worked for him from 1981 until June 1988. However, the affiant failed to indicate the frequency with which he saw the applicant during the requisite period or to state whether there were periods of time during the requisite period when he did not see the applicant. Further, though this affiant states that the applicant's mother worked for him from 1981 until June 1988, he does not state whether he consulted official records to determine her dates of employment or, if no such records exist, how he was able to determine the dates of her employment. He did not state whether there were periods of layoff or other unemployment during the applicant's mother's employment. Because this letter is significantly lacking in detail in general and because it is also lacking with regards to the criteria that the regulation at 8 C.F.R. § 245a.2(d)(3)(i) states employment affidavits must adhere to, it carries very minimal weight as either proof of the applicant's mother's employment during the requisite period or of the applicant's residence during that period.
- An affidavit from [REDACTED] that was notarized October 12, 2005. The affiant submitted a photocopy of his Certificate of Naturalization with his affidavit as proof his identity. This certificate indicates he became a United States Citizen on June 27, 1996. The affiant states that he himself first entered the United States in June 1983. He states that prior to that, he telephoned the applicant's mother from Sri Lanka in November and December 1981. He goes on to say that the applicant and his mother resided with him from July 1983 until June 1988. He asserts that the applicant's mother worked part time at the [REDACTED] from 1981 until 1988. He states that he knows of the applicant's brief absence from the United States in 1987 and that the applicant and his mother attempted to apply for legalization during the original filing period. **Though the applicant indicates that he resided with the applicant and his mother resided with him from July 1983 until June 1988 he fails to indicate whether there were periods of time when he did not see either of them during that time.** Further, because this affiant states he did not enter the United States until June 1983,

this affidavit carries no weight in establishing that the applicant first entered the United States before January 1, 1982.

- An affidavit from [REDACTED] that was notarized on October 22, 2005. The affiant submits a photocopy of his United States passport with his affidavit. This passport was issued to the affiant on June 29, 1998. The affiant states that he is the owner of [REDACTED]. He states that this business operated from 1974 to 1994. He goes on to say that he employed the applicant's mother from November 1981 until June 1988. He states that she did not work from January 10, 1987 until February 14, 1987 because she went to Sri Lanka to attend to her ill father. However, he states that she worked for his business until June 1988. He states that he supplied her with a similar letter in 1987 when she first attempted to apply for legalization and was turned away. With his affidavit, he attaches a Business Certificate. This certificate indicates that he moved his business from [REDACTED] in Staten Island to [REDACTED] in Staten Island. This certificate was signed on May 30, 1984. This document was first notarized on May 30, 1984 and then for a second time on March 28, 2006. The affiant further submitted a Business Certificate indicating that the [REDACTED] [sic.] [REDACTED] was operating at [REDACTED] in New Brighton, Richmond, New York. This certificate was signed and notarized on January 17, 1977. Though this affiant states that the applicant's mother worked for him from November 1981 until June 1988, he does not state whether he consulted official records to determine her dates of employment or, if no such records exist, how he was able to determine the dates of her employment. Because this letter is significantly lacking in detail in general and because it is also lacking with regards to the criteria that the regulation at 8 C.F.R. § 245a.2(d)(3)(i) states employment affidavits must adhere to, it carries very minimal weight as either proof of the applicant's mother's employment during the requisite period or of the applicant's residence during that period.

The director issued a NOID to the applicant on April 28, 2006. In her NOID, she stated that the applicant failed to produce evidence of his claimed entries through Canada. The director also noted that the applicant failed to submit medical records as proof of his residence in the United States. The director erroneously states that that applicant claimed to have resided in the United States from June 1980 until May 4, 1988. The director went on to say that the affidavits submitted by the applicant were not credible or amenable to verification. She stated that credible affidavits include documents identifying the affiant, proof the affiant was in the United States during the statutory period and proof that there was a relationship between the affidavit and the applicant as well as a current telephone number at which an affiant may be contacted for verification. Here, the director found the affidavits submitted by this applicant were lacking with regards to these criteria.

In response to the Director's NOID, the applicant resubmitted previously submitted affidavits and, with them, he submitted documents in an attempt to prove that affiants [REDACTED] and [REDACTED] were in the United States during the requisite period and that affiant Sunimal [REDACTED] resided in Canada during that time. He also submitted a declaration in response to the NOID. Details of these newly submitted evidence is as follows:

- Documents submitted to prove affiant [REDACTED] resided in the United States during the requisite period include:
  - Receipts issued to [REDACTED] dated in 1984 and 1986 by businesses in the United States.
  - Photocopies of registered mail receipts for [REDACTED] whose address is listed as [REDACTED] that are date stamped December 4, 1985 and December 6, 1985.
  - Envelopes mailed to [REDACTED] residing on [REDACTED] in Staten Island. The copies of these envelopes are of such quality that it is not possible to determine when they were mailed.
  
- Documents submitted to prove affiant [REDACTED] resided in the United States during the requisite period include:
  - An affidavit from [REDACTED] that was notarized on April 4, 2006. The affiant states he is the nephew of [REDACTED]. He states that he arrived in the United States in 1978. He states that he remembers [REDACTED] when he came to Staten Island, New York and he states that this business was located at [REDACTED] in Staten Island from 1981 until 1994. He goes on to say that 25-30 individuals were employed by [REDACTED] at that business.
  - A New York State Driver License for [REDACTED] issued to him on January 26, 2004.
  - A Form 4506-T request for Transcript of Tax Return signed by [REDACTED] which also indicates the name "[REDACTED]". Though this Form 4506-T is signed, it is noted that this was a 2005 tax return.
  - A FICA earnings statement for [REDACTED] indicating that he had earnings in the United States from 1972 until 1993.
  
- Documents submitted to prove affiant [REDACTED] resided in the United States during the requisite period include:
  - [REDACTED]'s Medicare Health Insurance Card.
  - [REDACTED]'s Birth Certificate indicating he was born in New York on January 8, 1938.
  - A Business Certificate for [REDACTED] Cleaning Service that was signed and notarized on October 4, 1977.
  - An Amended Business Certificate for [REDACTED]'s Cleaning Service indicating that this business relocated on January 30, 1987.
  - A Certificate of Discontinuance of Business for [REDACTED]'s Cleaning Service. This certificate indicates that [REDACTED]'s Cleaning Service began on October 4, 1977 and was discontinued on February 4, 1999. This certificate was notarized on February 4, 1999.
  - [REDACTED]'s FICA earnings that indicate he had earnings every year in the United States from 1956 to 1995. Also submitted is a photocopy of [REDACTED]'s Social

Security Card. The Social Security Number on these FICA earnings is consistent with the number on his Social Security Card.

- An affidavit from [REDACTED] a that was notarized on March 29, 2006. In this affidavit, the affiant states that [REDACTED] is her father. She states that she is aware that her father owned a cleaning service business called [REDACTED]'s Cleaning Service in Staten Island, New York. Here, she does not state when this business was in operation.
- To prove affiant [REDACTED] resided in Canada during the requisite period, the applicant submitted [REDACTED]'s Immigration Identification Card, which indicates he is a landed immigrant in Canada and that he entered Canada on November 12, 1971.
- The applicant further submitted a statement dated May 16, 2006. In this statement the applicant asserts that he did not claim that he residing in the United States since June 1980, as the director asserted in her NOID. He states that he claimed he first entered the United States in November of 1981. He states that he did attend a formal school in the United States. It is noted that the applicant's Form I-687 indicates he was a student for the duration of the requisite period but that a statement submitted by the applicant in September of 2005 indicates that the applicant was educated by his mother at home during the requisite period. He states that the only formal education he received was his 1993 Hotel School education. He goes on to say he received no health care while he was in the United States but that he did receive vaccinations from medical professionals in Sri Lanka. He provides a list of documents that he is enclosing with his NOID response and provides telephone numbers for affiants from whom he has submitted affidavits.

Here, the AAO notes that evidence in the record indicates that the applicant has consistently stated that he first entered the United States in November 1981 rather than in June 1980, as the director asserted in her NOID.

Here, the AAO notes that this error did not cause the applicant harm. 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 statement made by the director that the applicant has indicated that he first entered the United States in June 1980.

The director denied the application for temporary residence on September 28, 2006. In denying the application, the director stated that the evidence the applicant had submitted in support of his

having entered the United States prior to January 1, 1982 was not sufficient to meet his burden of proof. The director erroneously stated that the applicant only submitted two affidavits in support of his application. The AAO notes that the director went on to indicate that her office had reviewed more than two affidavits in making this determination. She states that the affidavit from [REDACTED] is not credible because his business was not registered in the State of New York during the requisite period or thereafter. She states that the individual who notarized his affidavit was not a licensed notary in New York. The director went on to say that the affidavit from [REDACTED] is not credible. She states that though [REDACTED]'s affidavit asserts that he owned [REDACTED] Cleaning Service in 1981, it was not a registered business entity in the State of New York during the requisite period. Therefore she found the affidavit from [REDACTED] not to be credible. The director went on to say that she found that the affidavit from [REDACTED] Perera was not credible because Service records indicated that he did not enter the United States until October 19, 1988. The director further stated that the affidavit [REDACTED] did not refer to the applicant's residence in the United States. The director concluded that the evidence submitted by the applicant was not sufficient to allow him to meet his burden of proof.

On appeal, the applicant asserts that he has met his burden of proof with the evidence he previously submitted. He submits a brief containing his arguments and he resubmits previously submitted evidence and additional evidence in support of his application.

In his brief, the applicant asserts that he submitted three affidavits in support of his claim of having resided continuously in the United States for the duration of the requisite period. He details previously submitted and new evidence that indicates that the affiants from whom he submitted affidavits resided in the United States during the requisite period.

Details of newly submitted evidence are as follows:

- A photocopy of [REDACTED]'s Social Security Card
- Photocopies of [REDACTED] 1990, 1991 and 1992 Forms 1040
- A photocopy of [REDACTED]'s telephone bill from March to April 2006.

The applicant concludes by stating that the director's claim that [REDACTED], [REDACTED] and [REDACTED]'s affidavits were not credible is without merit. He states that the documents submitted with [REDACTED] affidavit prove that he was operating a business during the requisite period. He states that the documents previously submitted with [REDACTED]'s affidavit prove that the business he claims to have operated was operational during the requisite period. The applicant goes on to state that the individual who notarized his documents was a Commissioner of Deeds whose license has since expired. He further asserts that though CIS records indicate that affiant [REDACTED] did not enter the United States before October 19, 1998, he has submitted documents that establish that he was actually in the United States from June 1983 until June 1988.

The AAO has reviewed the documents the applicant has submitted in support of his claim of having maintained continuous residence in the United States and has found that he has not met his burden of proof. Though he has submitted affidavits from [REDACTED] and from [REDACTED] who both state that they employed the applicant's mother, these affiants do not state that they personally know that the applicant was residing continuously in the United States during the requisite period. Though both affiants state that they began to employ the applicant's mother in 1981, they do not state how they were able to confirm the applicant's mother's start date as an employee. These affidavits are significantly lacking with regard to the criteria the regulation at 8 C.F.R. § 245a.2(d)(3)(i) states employment verification letters must adhere to. Though the applicant asserts that CIS records are inaccurate regarding the date that [REDACTED] first entered the United States, he asserts that [REDACTED] did not enter the United States until June of 1983. Therefore, [REDACTED] cannot be personally aware of when the applicant first entered or first began residing in the United States. The affidavits from [REDACTED] and from [REDACTED] lack detail regarding how they are able to verify when the applicant began residing in the United States and residence in Sri Lanka at that time. Therefore, the documents submitted by the applicant are not sufficient to allow him to establish that he first entered the United States before January 1, 1982.

In this case, the absence of credible and probative documentation to corroborate the applicant's claim of first entering the United States before January 1, 1982 seriously detracts 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 lack of credible supporting documentation, it is concluded that he 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.