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

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[Redacted]

FILE: [Redacted] MSC-06-090-15923

Office: LOS ANGELES

Date: SEP 18 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.

A handwritten signature in black ink, appearing to read "Robert P. 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, Los Angeles. 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 noted that the applicant was absent from the United States for a period of more than 45 days during the requisite period. The director found this caused the applicant to fail to meet his burden of establishing that he maintained continuous residence in the United States pursuant to the regulation at 8 C.F.R. § 245a.2(h)(1)(i), which states in pertinent part that to have maintained continuous residence during the requisite period, no single absence from the United States can have exceeded 45 days. Because of this, the director determined he was not eligible to adjust to temporary resident status pursuant to the CSS/Newman Settlement Agreements and denied the application.

On appeal, the applicant submits a sworn statement in which he asserts that his absence from the United States during the requisite period was for less than 45 days.

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).

An applicant shall be regarded as having resided continuously in the United States if at the time of filing an application for temporary resident status, no single absence from the United States has exceeded forty-five (45) days, and the aggregate of all absences has not exceeded one hundred and eighty (180) days between January 1, 1982, through the date the application is filed, unless the applicant can establish that due to emergent reasons the return to the United States could not be accomplished within the time period allowed, the applicant was maintaining residence in the United States, and the departure was not based on an order of deportation. 8 C.F.R. § 245a.1(c).

If the applicant's absence exceeded the 45-day period allowed for a single absence, it must be determined if the untimely return of the applicant to the United States was due to an "emergent reason." Although this term is not defined in the regulations, *Matter of C-*, 19 I&N Dec. 808 (Comm. 1988), holds that emergent means "coming unexpectedly into being."

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 contains two Forms I-687 as follows:

The record contains a Form I-687 and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet, to CIS on December 29, 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: [REDACTED] in Los Angeles, California from February 1980 until May 1987; and 809 [REDACTED] in Inglewood, California from May 1987 until 1992. At part #32 where the applicant was asked to list all of his absences from the United States, he indicated that he was absent from the United States once during the requisite period, when he traveled to Mexico from June 1987 until September 1987 because there was an illness in the family. 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 he was employed by [REDACTED] doing building maintenance in Los Angeles, California from March 1980 until June 1989. Part #43 of this application indicates that the applicant did not obtain assistance when he completed the application.

The record also contains a Form I-687 and a Form for Determination of Class Membership in CSS vs. Thornburgh submitted by the applicant on June 17, 1993. The applicant was consistent regarding his addresses of residence, his employment and his absences in the United States on this Form I-687. It is noted that at part #48 of this application does not indicate that the applicant was assisted by another individual when he prepared the application. At part #9 of his Form for Determination of Class Membership in CSS vs. Thornburgh, the applicant indicated the he departed from the United States on June 24, 1987 and went to Mexico because of a family emergency. He stated that he re-entered the United States on September 20, 1987. At part #12 of this Form the applicant reiterated that he was afraid to apply for legalization because he had an absence from the United States during the requisite period that was for three months.

Also in the record are interview notes taken by an immigration officer and a sworn, signed statement taken from the applicant at the time of his interview with an immigration officer on September 30, 1993. Both the interview notes and the signed, sworn statement were taken from the applicant under oath and indicate that the applicant stated that he traveled to Mexico from June 24, 1987 until September 20, 1987.

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.

The applicant submitted the following evidence that is relevant to his residence in the United States during the requisite period:

- A declaration from the applicant's landlord, [REDACTED], that is dated June 8, 1993. The declarant states that the applicant resided at his residence on [REDACTED] in Los Angeles from February 1980 until April 1987 and that the declarant collected rent from the applicant.
- A second declaration from [REDACTED] that is not dated. The declarant states that the applicant resided at his house on [REDACTED] in Los Angeles from February 1980 until April 1987. He states that they then moved to his current address, which he indicates is on [REDACTED] in Inglewood, California.
- An affidavit from [REDACTED] that was notarized on June 7, 1993. The affiant states that he met the applicant in 1980 because the applicant worked as a handyman at the apartment building where he then resided. He states that he saw the applicant on a regular basis. Though he states that there were no months during which he did not see the applicant, it is noted that the applicant stated that he was absent from the United States from June to September of 1987 both on his Form I-687 submitted in 1993 and in the previously noted signed, sworn statement.
- An affidavit from [REDACTED] that was notarized on June 7, 1993. The affiant states that he personally knows that the applicant resided on [REDACTED] from April 1987 until the date [REDACTED]

he submitted the affidavit. The affiant states that he met the applicant at his brother-in-law's house in 1987 and that he has seen the applicant twice a week. However, the affiant did not state when he began to see the applicant twice a week. Though the affiant states that there were no months during which he did not see the applicant, it is noted that the applicant stated that he was absent from the United States from June to September of 1987 both on his Form I-687 submitted in 1993 and in the previously noted signed, sworn statement.

- An affidavit from [REDACTED] that is dated June 7, 1993. The affiant states that he owns apartments and that he employed the applicant from March 1980 until May 1989. He provides the applicant's address of residence during the requisite period and states that he paid the applicant with cash. However, the affiant does not state how he was able to determine the applicant's dates of employment or whether he consulted official records prior to providing them. He does not state whether there were periods of layoff or unemployment during the applicant's time as his employee. Because this affidavit is lacking with regards to the criteria the regulation at 8 C.F.R. § 245a.2(d)(3)(i) states employment verification affidavits must adhere to, minimal weight can be accorded to this affidavit as evidence of the applicant's continuous residence in the United States during the requisite period.

It is noted that the applicant also submitted evidence as proof of his residence in the United States subsequent to the requisite period. The issue in this proceeding is whether the applicant submitted sufficient evidence to prove that he unlawfully resided continuously in the United States for the duration of the requisite period. As this evidence does not pertain to the requisite period, it is not relevant to the matter at hand and is, therefore, not discussed here.

The director denied the application for temporary residence on February 2, 2007. In denying the application, the director noted that the applicant provided the former Immigration and Naturalization Service (INS) with the previously noted sworn statement in 1993 in which he asserted that he was absent from the United States from June 24, 1987 until September 20, 1987, a period of 88 days. The director found the applicant failed to meet his burden of establishing that he maintained continuous residence in the United States pursuant to the regulation at 8 C.F.R. § 245a.2(h)(1)(i), which states in pertinent part that to be regarded to have maintained continuous residence during the requisite period, no single absence from the United States can have exceeded 45 days. Because the applicant did not establish that he maintained continuous residence in the United States for the duration of the requisite period, 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 submits a sworn statement in which he asserts that his absence from the United States during the requisite period was from July 1987 until either the 8th or the 10th of August in 1987, a period of 35 days. He states that in 1993 another individual completed his application and he informed that individual that he did not remember the exact dates, but that he left in June, July or September. He asserts that a miscommunication resulted in the person

incorrectly completing his application and states that he was not absent from the United States for 90 days.

The AAO has reviewed the documents in the record that are relevant to the applicant's claim that he maintained continuous residence in the United States and has found that the applicant has not satisfied his burden of proof. Though the applicant states on appeal that he had assistance when he completed his 1993 Form I-687 application and that a miscommunication caused this individual to incorrectly state that the applicant was absent from the United States for 90 days, that Form I-687 does not indicate that the applicant had assistance completing it. Further, the applicant himself wrote a signed, sworn statement in 1993 on which he provided very specific dates associated with his absence from the United States. This statement was written by the applicant in Spanish. In addition, the applicant's Form I-687 submitted in 2005 also indicates that the applicant had a three month absence from the United States. On appeal, the applicant also states that he was turned away when first attempted to apply for legalization because he told an immigration officer that he left for 35 days. However, this is not consistent with his previously noted Form for Determination of Class Membership in *CSS vs. Thornburgh*, where he indicated that he did not attempt to apply for legalization because he was discouraged from doing so because of his three month absence from the United States.

In this case, the absence of credible and probative documentation to corroborate the applicant's claim of continuous residence for the entire requisite period, as well as the inconsistencies and contradictions noted in the record, 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 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.