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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS2090
Washington, DC 20529-2090

**U.S. Citizenship
and Immigration
Services**

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FILE:

MSC 05 231 12189

Office: SAN FRANCISCO

Date: APR 22 2009

IN RE:

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.

IN 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.

A handwritten signature in black ink, appearing to read "John F. Grissom".

John F. Grissom
Acting 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 Director, San Francisco, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director determined the applicant had not demonstrated that she had continuously resided in the United States in an unlawful status since before January 1, 1982 through the date that she attempted to file a Form I-687, Application for Status as a Temporary Resident, with the Immigration and Naturalization Service or the Service (now U.S. Citizenship and Immigration Services or USCIS) in the original legalization application period of May 5, 1987 to May 4, 1988. Therefore, the director determined that the applicant was not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements and denied the application.

On appeal, counsel asserts that the applicant had submitted sufficient evidence to establish continuous residence in the United States during the requisite period.

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 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 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 presence in accordance with the regulation at 8 C.F.R. § 245a.2(b), “until the date of filing” shall mean until the date the alien attempted to file a completed Form I-687 application and fee or was caused not to timely file, consistent with the class member definitions set forth in the CSS/Newman Settlement Agreements. Paragraph 11, page 6 of the CSS Settlement Agreement and paragraph 11, page 10 of the Newman Settlement Agreement.

An alien applying for adjustment of status has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, 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. *See* 8 C.F.R. § 245a.2(d)(5).

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 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 or petitioner 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 or petition.

Although the regulations provide an illustrative list of contemporaneous documents that an applicant may submit, the list also permits the submission of affidavits and any other relevant document. *See* 8 C.F.R. § 245a.2(d)(3)(vi)(L).

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 issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that she continuously resided in the United States in an unlawful status during the requisite period. Here, the applicant has failed to meet this burden.

In an attempt to establish continuous unlawful residence since before January 1, 1982, through May 4, 1988, the applicant provided the following evidence:

- An affidavit notarized May 18, 1990, from _____ formerly of Dallas, Texas, who indicated that the applicant resided with her at _____ Texas from May 1983 to March 1990.
- An additional affidavit notarized July 24, 2002, from _____ of Allen, Texas, who reasserted the veracity of her initial affidavit. The affiant asserted that the applicant “had told me that she came from India in the end of 1981.”
- An affidavit dated May 17, 1990, from _____ of _____ in Mesquite, Texas, who indicated that he has known the applicant since November

1981 and that the applicant was in his employ as a cleaner and presser from December 1981 to March 1990.

- An affidavit from [REDACTED] of Fremont, California, who attested to the applicant's arrival in the United States at the end of 1981. The affiant asserted, "we used to have a contact with each other by phone before she moved to the bay area."
- An affidavit from [REDACTED] of South San Francisco, California, who indicated that the applicant is a childhood friend from India and that the applicant "had told me that she came from India in November 1981." The affiant asserted that he is sure that the applicant has been residing in the United States for more than 20 years.
- An affidavit from [REDACTED] of Alberta, Canada, who asserted that the applicant visited him in December 1987 and "called to let me know for her safe entry to United States on December 15, 1987."

On December 29, 2006, the director issued a Notice of Intent to Deny, which advised the applicant that the affidavits submitted did not contain sufficient objective evidence to which they could be compared to determine whether the attestations were credible, plausible, or internally consistent with the record. The applicant was advised that no evidence was submitted demonstrating that the affiants had direct personal knowledge of the events testified in their respective affidavits.

Counsel, in response, asserted that the applicant provided sufficient evidence as the affidavits presented appear credible, given that they offer specific references to dates and the fact that a lot of time has passed since the occurrence of the events being related.

The director, in issuing his Notice of Decision, noted that inconsistencies were found between the affiants' statements regarding the applicant's residence in Texas and California in 1990. However, the applicant's residence in 1990 has no bearing in this proceeding. As noted above, an applicant for temporary resident status must establish entry into the United States before January 1, 1982 and continuous residence in the United States since such date through the date that she attempted to file a Form I-687, application in the original legalization application period of May 5, 1987 to May 4, 1988.

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).

USCIS has determined that affidavits from third party individuals may be considered as evidence of continuous residence. *See Matter of E-- M--*, *supra*. In ascertaining the evidentiary weight of such affidavits, USCIS must determine the basis for the affiant's knowledge of the information to which he is attesting; and whether the statement is plausible, credible, and consistent both internally and with the other evidence of record. *Id.*

Following the dicta set forth in *Matter of E-- M--*, *supra*, the affidavits would not necessarily be fatal to the applicant's claim, if the affidavits upon which the claim relies are consistent both internally and with the other evidence of record, plausible, credible, and if the affiant sets forth the basis of his knowledge for the testimony provided. The statements issued by the applicant have been considered. However, the AAO does not view the documents discussed above as substantive enough to support a finding that the applicant entered the United States prior to January 1, 1982, and resided since that date through May 4, 1988, as she has presented inconsistent documents, which undermines her credibility.

The employment affidavit from [REDACTED] failed to include the applicant's address at the time of employment as required under 8 C.F.R. § 245a.2(d)(3)(i). Under the same regulations, the affiant also failed to 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.

As [REDACTED] never resided in the United States, his affidavit can only serve to establish the applicant's visits to Canada in 1981 and 1987. [REDACTED] indicated that the applicant told her that she arrived from India in 1981. As such, affiant cannot attest to the applicant's residence in the United States prior to May 1983.

Likewise, the applicant told [REDACTED] of her arrival from India in November 1981, and Mr. [REDACTED] in his affidavit, is silent to the initial date he met or associated with the applicant in the United States. [REDACTED] indicated that he "had a contact by phone" with the applicant prior to her moving to California. The absence of sufficiently detailed documentation to corroborate the applicant's claim of continuous residence for the entire requisite period seriously detracts from the credibility of her claim.

The applicant indicated on her application to have resided in Mesquite, Texas from November 1981 to May 1983. The applicant, however, has not provided any credible evidence such as lease agreements, utility bills or affidavits from affiants who were residing Texas and, therefore, could attest to her residence during the period in question. None of the affiants attested to the applicant's purported residence in Mesquite, Texas.

Doubt cast on any aspect of an applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence. It is incumbent upon an 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 (BIA 1988).

An alien applying for adjustment of status has the burden of proving by a preponderance of evidence that he or she has continuously resided in an unlawful status in the United States from prior to January 1, 1982 through the date of filing, is admissible to the United States under the provisions of section 245A of the Act, 8 U.S.C. § 1255a, and is otherwise eligible for adjustment of

status. 8 C.F.R. § 245a.2(d)(5). The applicant has failed to meet this burden. Therefore, the applicant is ineligible for temporary resident status under section 245A of the Act.

It is noted that the applicant had filed a Form I-485 application under the LIFE Act which was denied by the director on May 12, 2005. The applicant's appeal from the denial of her application has been rejected as untimely by the AAO. A different counsel represented the applicant during the Form I-485 proceedings.

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