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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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[redacted]

FILE: [redacted] Office: NEW YORK Date: AUG 17 2009
MSC 05 358 11169

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.

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, 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 denied the application finding that the applicant had not provided credible evidence to establish that he had entered the United States prior to January 1, 1982, and thereafter continuously resided in the United States in an unlawful status for the duration of the requisite period. The director also found that the applicant had disrupted his period of required continuous physical presence.

On appeal, the applicant states that the documentation and oral testimony were sufficient for the United States Citizenship and Immigration Services (USCIS) to approve his case.

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 245(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)(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 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). To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from his or her own testimony, and the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility. 8 C.F.R. § 245a.2(d)(6).

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 or petitioner 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 submitted sufficient credible evidence to meet his burden of establishing that he (1) entered the United States before January 1, 1982, (2) has continuously resided in the United States in an unlawful status for the requisite period of time and (3) had not disrupted his period of required continuous physical presence in the United States during the statutory period of November 6, 1986 to May 4, 1988.

The applicant claimed during his Form I-687 application interview that he first entered the United States by crossing the Canadian border in October 1981. The applicant's class membership determination form and prior Form I-687 application signed by the applicant on September 10, 1992 indicates that the applicant entered the United States without a visa on December 1981 by crossing the Canadian border. During his Form I-485 application interview, the applicant stated that he entered Canada with someone else's passport in December 1981 and then traveled by van to New York. There is no explanation of record for the discrepancy as to the date and manner in which the applicant entered the United States.

The applicant submitted affidavits and letters from friends, a letter from [redacted], assistant pastor of the African Salvation Baptist Church and a letter from Masjid Malcolm Shabazz to establish his initial entry and residence in the United States during the requisite period.[1] The affidavits from [redacted] and [redacted] state that they have personally known and been acquainted with the applicant in the United States and

[1] The AAO notes the inconsistency between the applicant's claimed participation in both the African Salvation Baptist Church, which is Christian, and the Masjid Malcolm Shabazz, which is Muslim.

have personal knowledge that the applicant resided in the United States at , New York, New York, from December 1981 to January 1991. However, the applicant claims on his current Form I-687 application that he resided at New York, New York, from December 1981 to January 1991. The affiants also attest to how they met the applicant and the applicant's good moral character but have not provided any other information about the applicant.

, pastor of the African Salvation Baptist Church states in her letter that she met the applicant in December 1981 and has seen him in church several times. also known as states that he has known the applicant since 1985 in New York City and used to see him buying merchandise in wholesale stores on Broadway around 28th Street. manager of Dong Jin Trading Company, Inc., states that the applicant was a regular customer since 1981 and purchased different types of merchandise from his store. states that he has known the applicant since 1981 as a street vendor on Fordham Road in the Bronx. The manager of the Hotel Bryant, whose signature is illegible, states that the applicant lived at the hotel, located at , New York, New York, from December 1981 to January 1991. The applicant stated at his Form I-687 application interview that he only resided at this address for three years, from 1981-1983.

The inconsistencies in the evidence provided regarding the applicant's initial entry and various residences in the United States are material to the applicant's claim in that they have a direct bearing on the length of time the applicant actually resided in the United States during the requisite period. No evidence of record resolves these inconsistencies. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. 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. *See Matter of Ho,* 19 I&N Dec. 582, 591-92 (BIA 1988).

The remaining evidence consists of a letter from the Masjid Malcolm Shabazz signed by of Public Information, which states that the applicant has been a member of the Muslim community and attended Friday Jumah Prayer Service and other prayer services at the Masjid Malcolm Shabazz since December 1981. The regulation at 8 C.F.R. § 245a.2(d)(3)(v) provides requirements for attestations made on behalf of an applicant by churches, unions, or other organizations. Attestations must (1) identify applicant by name; (2) be signed by an official (whose title is shown); (3) show inclusive dates of membership; (4) state the address where applicant resided during membership period; (5) include the seal of the organization impressed on the letter or the letterhead of the organization, if the organization has letterhead stationery; (6) establish how the author knows the applicant; and (7) establish the origin of the information being attested to. The letter from does not contain most of the aforementioned requirements and can only be given nominal weight.

The affidavits and letters do not include sufficient detailed information about the claimed relationship spanning over 27 years and the applicant's continuous residency in the United States since before January 1, 1982 and throughout the requisite period. For instance, none of the witnesses supplies any details about the applicant's life, such as, knowledge about his family members, shared activities, hobbies and interests. The affiants fail to indicate any other details that would lend credence to their claimed acquaintance with the applicant and the applicant's residence in the United States during the requisite period.

The affidavits and letters do not provide concrete information, specific to the applicant and generated by the asserted associations with him, which would reflect and corroborate the extent of those associations and demonstrate that they were a sufficient basis for reliable knowledge about the applicant's residence during the time addressed in the affidavits. To be considered probative and credible, witness affidavits must do more than simply state that an affiant knows an applicant and that the applicant has lived in the United States for a specific time period. Their content must include sufficient detail from a claimed relationship to indicate that the relationship probably did exist and that the witness does, by virtue of that relationship, have knowledge of the facts alleged.

The affidavits and letters do not contain sufficient detail to establish the reliability of their assertions. The affidavits and letters are insufficient to establish the applicant's 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 requisite period.

Another issue in this proceeding is whether the applicant disrupted his period of continuous physical presence in the United States during the statutory period of November 6, 1986 to May 4, 1988.

A legalization applicant must show continuous physical presence in the United States from November 6, 1986 through May 4, 1988. *See* Section 245A(a)(3)(A) of the Act, 8 U.S.C. § 1255a(a)(3)(A). An absence during this period which is found to be brief, casual and innocent shall not break a legalization applicant's continuous physical presence. Section 245A(a)(3)(B) of the Act, 8 U.S.C. § 1255a(a)(3)(B). *See e.g. Espinoza-Gutierrez v. Smith, INS, et al.*, 94 F.3d 1270 (9th Cir. 1996). The *Espinoza-Gutierrez* court held that a legalization applicant's absence would not represent a break in continuous physical presence if it was found that the absence was brief, casual and innocent as defined by the court in *Rosenburg v. Fleuti*, 374 U.S. 449 (1963) *See also Assa'ad v. U.S. Attorney General, INS*, 332 F.3d 1321 (11th Cir. 2003)(which affirmed the portion of the holding in *Espinoza-Gutierrez* relied upon here, but disagreed with a different aspect of that holding.) The AAO finds that the applicant's absence from the United States in this case was not brief, casual and innocent in that the record indicates: that he was absent from the United States for more than 45 days.[2] *See Rosenberg, supra* (where the court looked to (1) the duration of the alien's

[2] The regulation implementing the statutory requirement of "continuous unlawful residence" in the United States defines that term as no single absence from the United States exceeding 45 days and absences in the aggregate not exceeding 180 days. See, section 245A(a)(2)(A) of the Act, 8 U.S.C.

absence; (2) the purpose of the absence; and (3) the need for special documentation to make the trip abroad to determine whether the absence was a brief, innocent and casual or meaningfully disruptive of the alien's residence in the United States.)

The applicant states in his sworn statement during his Form I-687 application interview that he left the United States to go to Senegal in February or April of 1988 and returned in May 1988. The interviewer's notes and the applicant's class membership determination form and previous Form I-687 application also reveal that the applicant visited Senegal from January 10, 1988 to February 10, 1988. On appeal, the applicant has not provided any explanation and evidence to dispute the director's statement regarding his departure from the United States to Senegal in February 1988 and reentry in May 1988. The applicant's absence from the United States from February 1988 to May 1988 establishes a break in his period of continuous physical presence in the United States during the requisite period.

Considering all the evidence of record, the AAO finds that the applicant has not established that he resided in the United States for the requisite period. Given the lack of detail in the affidavits and letters, and the inconsistencies regarding the applicant's initial entry and continuous residence in the United States, the applicant has failed to submit sufficient evidence to overcome the director's denial. The evidence calls into question the credibility of the applicant's claim of continuous unlawful residence in the United States throughout the requisite period. The evidence submitted is insufficient to establish the applicant's 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 requisite period. Moreover, the applicant's absence from the United States from February 1988 to May 1988 establishes a break in his period of continuous physical presence in the United States during the requisite period.

Therefore, based upon the foregoing, the applicant has failed to establish by a preponderance of the evidence that he entered the United States before January 1, 1982, has been continuously physically present in the United States since November 6, 1986 and 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.

The record reveals that the applicant was convicted of disorderly conduct, a violation in the criminal court of the City of New York, on May 3, 1994 ( ) and on October 12, 1993 . These convictions do not disqualify the applicant from temporary resident status.

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§ 1255(a)(2)(A) and 8 C.F.R. § 245a.1(c)(1)(i). The term "continuous physical presence" suggests that a shorter time frame should be applied to determine the permissible length of single and aggregate absences from the United States during the period from November 6, 1986 to May 4, 1988.

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