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

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FILE: [redacted] Office: NEW ORLEANS Date: MAY 14 2009

MSC 05 265 13115

IN RE: Applicant: [redacted]

PETITION: 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. All documents have been returned to the office that originally decided your case. If your appeal was sustained, or if the matter was remanded for further action, you will be contacted. If your appeal was dismissed, 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.

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 Orleans, Louisiana, and 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. 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, counsel asserts that the applicant provided sufficient evidence of his physical presence and continuance residence in the United States from 1981 to 1986.

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 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).

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 including affidavits 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.* 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.

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 for the duration of the requisite period. Here, the applicant has failed to meet this burden.

The record reflects that on October 22, 1997, a Form I-130, Petition for Alien Relative, was filed on behalf of the applicant by his former spouse. Along with the Form I-130, a Form I-485 application, Application to Register Permanent Residence or Adjust Status, was filed by the applicant.[1] The applicant indicated on the Form I-485 that he last entered the United States on May 10, 1989. Accompanying the Form I-485 application was a Form G-325A, Biographic Information signed September 26, 1997. The applicant indicated on the Form G-325A, to have resided in Hanover, Germany from November 1982 to May 1989.

On February 1, 2008, the director issued a Notice of Intent to Deny, which advised the applicant that he had not submitted sufficient evidence to establish continuous unlawful residence since before January 1, 1982 to the date he attempted to file a Form I-687 application. The applicant was given 30 days in which to submit a rebuttal. The applicant, however, failed to respond to the notice.

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[1] The applicant was assigned alien registration number The Form I-485 application based on the filing of the Form I-130 was denied on April 15, 2004.

The director, in denying the application, noted that the applicant had indicated on a Form I-485 that he had entered the United States as a visitor on May 10, 1989, and that the applicant had indicated on a Form G-325A to have resided in Hanover, Germany from November 1982 to May 1989. The director determined that the applicant had not demonstrated that he had continuously resided in the United States in an unlawful status from before January 1, 1982, through the date he attempted to file a Form I-687 application. On appeal, counsel asserts, in pertinent part:

> It appears that the applicant's former attorney erroneously completed applicant's G-325 in 1999 and indicated that applicant lived in Germany from November 1982 to May 1989. A review of [the applicant's] file clearly shows that he only made a brief visit to Germany in 1989 and did not live there from 1982 to 1989.

Counsel, however, has not provided any credible evidence from former counsel to support his assertion. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel submits an affidavit from the applicant, who asserts, in pertinent part, "the corrections he believed he gave to his then attorney, John Stobbs, were not incorporated in the G-325 as submitted to USCIS." The applicant, however, has not provided any credible evidence from Mr. Stobbs to support his assertion. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Furthermore, the credibility of the statements made by counsel and the applicant on appeal have been further diminished as in a separate proceeding, the record reflects that a Form I-130 was filed on behalf of the applicant by his current spouse on February 12, 2008. Along with the Form I-130, a Form I-485 application and a Form G-325A were filed by the applicant signed January 25 and 28, 2008, respectively. The applicant indicated on the Form I-485 indicated that he last arrived in the United States on May 10, 1989, and indicated on his Form G-325A that he resided in his native country, India, from May 1953 to March 1989. In this proceeding, the Form I-485 application was prepared by current counsel.

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 applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

These factors tend to establish that the applicant utilized documents in a fraudulent manner in an attempt to support his claim of residence in the United States during the requisite period. By engaging in such an action, the applicant has irreparably harmed his own credibility as well as the credibility of his claim of continuous residence in the United States for requisite period. Accordingly, it is concluded that the applicant has failed to establish continuous residence in an

unlawful status in the United States for the duration of the requisite period. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis.

Finally, it is noted for the record that in response to a request for the court dispositions for his arrests on October 27, 1995 (for petty theft in Turlock, California), and on May 5, 1988 (for battery in Alton, Illinois), the applicant submitted court documentation from the Stanislaus County Superior Court in California indicating that no charges were found in the applicant's name. However, the record contains an FBI report that reveals the applicant was convicted of the petty theft offense and was placed on probation for two years. The applicant also submitted court documentation from the Madison County Third Judicial Circuit Court in Illinois, which indicates that on June 10, 1998, a *nolle prosequi* was entered for the battery offense in Case no. 98-1589A.

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