

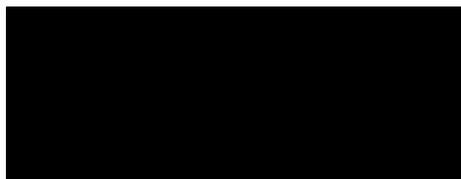
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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**U.S. Citizenship  
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Services**

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FILE:   
MSC 06 096 12369

Office: NEW YORK

Date: SEP 08 2009

IN RE: Applicant: 

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:



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 York, New York, 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 puts forth a brief disputing the director's findings.

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 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 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 during the requisite period. Here, the applicant has failed to meet this burden.

The record reflects that on August 1, 1995, a Form I-130, Petition for Alien Relative, was filed on behalf of the applicant by his former spouse. Accompanying the Form I-130 is a Form I-485 application and a Form G-325A, Biographic Information, signed by the applicant on June 29, 1995.<sup>1</sup> The applicant indicated on his Form G-325A that he resided in his native country, Ecuador, from September 1965 to May 1989.

In an attempt to establish continuous unlawful residence in the United States since prior to January 1, 1982, the applicant submitted:

- A freight receipt from Ecuadorian Line Inc. in Brooklyn, New York dated June 6, 1983.
- An affidavit from [REDACTED] who indicated that he was the applicant’s roommate during 1987 at [REDACTED]. The affiant attested to the applicant’s absence from the United States from November 4, 1987 to November 28, 1987.

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<sup>1</sup> The Form I-130 and the Form I-485 based on the filing of the Form I-130 were assigned alien registration number [REDACTED] and have been consolidated into [REDACTED]. The Form I-130 and Form I-485 were denied on September 16, 2003.

- Form 1099-MISC, Miscellaneous Income for 1984 and 1985 from [REDACTED] General in Woodside, New York.
- A letter dated August 22, 1989, from [REDACTED] General Contractor of Woodside, New York, who indicated that the applicant was in his employ as a general construction operator from September 1981 to December 1985.
- A wage and tax statement for 1987 from [REDACTED] A letter dated September 7, 1989, from [REDACTED] manager of Restivo Bros. Bakers in Ridgewood, New York, who attested to the applicant's employment as a general helper from February 1986 to April 1988.
- Photocopied money transfer receipts dated December 17, 1981, July 19, 1982, May 10, 1983, and November 18, 1983, from Equa Travel in Brooklyn, New York, which listed the applicant's residence in Brooklyn at [REDACTED] An affidavit from [REDACTED] who indicated that he has been acquainted with the applicant since January 1982. The affiant indicated that he and the applicant would get together every weekend to play volleyball, go to the park with their families and have visited each other's homes.
- An affidavit from [REDACTED] who indicated that she met the applicant through his son, [REDACTED] in 1981 as they played volleyball together. The affiant indicated that they often visited each other's homes to have dinner and socialize with family members.
- Affidavits from [REDACTED] and [REDACTED] who attested to the applicant's residence in Brooklyn, New York at [REDACTED] from August 1981 to May 1988. Mr. [REDACTED] affidavit indicated he met the applicant at a birthday party in Brooklyn. Mr. [REDACTED] indicated that he met the applicant at Flushing Park during the Ecuadorian festivities.
- A letter from a landlord, [REDACTED] who attested to the applicant's residence at [REDACTED], Brooklyn, New York from August 1981 to May 1988.
- A letter dated March 28, 2006, from [REDACTED] pastor for Transfiguration Church in Brooklyn, New York, who indicated that the applicant has been involved in church activities for the last 25 years and attested to the applicant's address at [REDACTED] from 1981 to 1988.

The applicant also submitted a statement from the Social Security Administration, which reflected his earnings from 1990 along with a summons from the New York State Supreme Court to serve as evidence that [REDACTED] was in New York in April 1982.

On September 6, 2006, the director issued a Notice of Intent to Deny, which advised the applicant that: 1) he failed to submit evidence of his entry into Mexico in 1981; 2) the affidavits submitted appeared to be not credible and that no evidence was submitted demonstrating that the affiants had direct personal knowledge of the events testified to in their respective affidavits; 3) the employment letter from Restivo Bros. Bakers was not corroborated by documentary evidence; 4) the authenticity of the photocopied money transfers receipts could not be verified; 4) there was no listing within the New York Department of State's Division of Corporations for [REDACTED] Contractor and the social security statement did not reflect any earnings for the

applicant until 1990; 5) he failed to submit documentation from Transfiguration Church establishing his membership and participation and he indicated on his Form I-687 application to have not been affiliated or associated with any religious organization; 6) [REDACTED]'s affidavit was not supported by documentary evidence such as receipts of payment of rent and utilities; and 7) on his Form G-325A, the applicant indicated that he resided in his native country, Ecuador, from September 1965 to May 1989.

Counsel, in response, asserted that as the applicant entered the United States through the Mexican border in 1981, it was not possible for the applicant to provide evidence of such entry as he entered without inspection.

In regards to the affidavit from [REDACTED] counsel asserted that the summons establishes that the [REDACTED] and the plaintiff "had prior dealings prior to this date. April is the beginning of the year so it is not unreasonable to surmise that if they had, at the very least, a six-month business dealing, this would have been before January of 1982...."

In regards to Restivo Brothers Bakers, Inc. counsel submitted printouts from ABI Law Review and from a website (www.iciclesoftware.com) regarding the bankruptcies of several corporations filed before the Second Circuit Court of Appeals and decided by the Court in 1988. Counsel asserted, "[i]f so, not only does this legal case establish that [the applicant's] employer existed, most of all, it shows that in 1988, this business, consistent with [the applicant's] testimony and IRCA application on the record existed."

In regards to the [REDACTED] counsel asserted, "it is not unheard of that American business in urban areas who employ undocumented [sic] are themselves unlicensed or unregistered with the New York State's Division of Corporation."

In regards to the applicant's Form G-325A, counsel asserted, "[i]t is [the applicant's] representation to us that he was helped in this filing by an unlicensed notario agency in Brooklyn." Counsel asserted that the applicant did not read the Form G-325A as it was filled out and the error was overlooked. Counsel asserted whereas the photocopied money transfers were accorded little weight, the same should apply to the Form G-325, "especially whereas such filings were not done by attorneys held to ethical standards but an unlicensed notarios."

The director, in denying the application on August 20, 2007, stated that: 1) counsel's response did not rebut the inadequacies of [REDACTED] affidavit;<sup>2</sup> 2) the documentation provided for Restivo Brothers Bakers, Inc., only served to establish that the business existed; however, the specific points outlined in the Notice of Intent to Deny had not been addressed; 3) no evidence was provided to corroborate counsel's claim that [REDACTED] Contractor employed undocumented aliens; 4) why would a company ([REDACTED]) that was afraid to register with the New York State be willing to issue Form 1099-MISC, and the attempt to attach this argument to Transfiguration Church in Brooklyn was a non-sequitur; and 5) the record does not indicate that

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<sup>2</sup> The director inadvertently noted [REDACTED]'s name as [REDACTED]

anyone other than the applicant assisted in preparing the Forms I-485 and G-325A. The director concluded that based on the insufficiency of the applicant's response, the failure to rebut the grounds detailed in the Notice of Intent to Deny and the information contained in Form G-325A, the applicant had failed to establish by a preponderance of the evidence that he continuously resided in the United States since before January 1, 1982 to the date he attempted to file his Form I-687 application.

On appeal, counsel asserts that the applicant has submitted ample circumstantial evidence which is credible, consistent and probative of his eligibility for the benefit being sought. Counsel asserts that it is not possible to substantiate an entry which was without inspection. Counsel asserts that the applicant was paid "under the table" while employed by Restivo Brothers Bakers, Inc. and, therefore, there would be no written documentation of his employment, let alone his schedule and salary.

Counsel asserts that without a valid social security number, the applicant had no means of opening a bank account and all his earnings and rent payments were paid in cash. Counsel asserts as such there would not be any evidence of the money paid to [REDACTED]

Counsel asserts that during the 1980's Transfiguration Church was a place where many men from Central America came for solace and shelter and that the church is four blocks from where the applicant used to reside. Counsel asserts that his circumstantial evidence more than meets the light standard of preponderance of the evidence that the applicant meets the statutory requirements for amnesty.

The statements issued by counsel, on appeal, 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 the date he attempted to file his application, as he has presented contradictory and inconsistent documents, which undermines his credibility.

The letter from [REDACTED] has little evidentiary weight or probative value as it does not conform to the basic requirements specified in 8 C.F.R. § 245a.2(d)(3)(v). Most importantly, the pastor does not explain the origin of the information to which he attests. As previously noted, this letter raises questions to its authenticity as the applicant did not list any affiliation with a religious organization during the requisite period on his initial and current Form I-687 applications

Counsel's assertion that the applicant was paid "under the table" in cash by Restivo Brothers Bakers, Inc., is without merit as the 1987 wage and tax statement from this company reflects that income was subject to withholding of taxes.

The affiants' statements do not provide detailed accounts of an ongoing association establishing a relationship under which the affiants could be reasonably expected to have personal knowledge of the applicant's residence, activities and whereabouts during the requisite period. To be

considered probative, an affiant's affidavit 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. The affidavit must contain sufficient detail, generated by the asserted contact with the applicant, to establish that a relationship does in fact exist, how the relationship was established and sustained, and that the affiant does, by virtue of that relationship, have knowledge of the facts asserted. The affidavits from the affiants do not provide sufficient detail to establish that they had an ongoing relationship with the applicant that would permit them to know of the applicant's whereabouts and activities throughout the requisite period.

The information indicated on the applicant's Form G-325A dated June 29, 1995, tends 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.

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).

Given the credibility issues arising from the documentation provided by the applicant, it is determined that the applicant has not met his burden of proof. Therefore, based upon the foregoing, the applicant 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.