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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
and Immigration
Services

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[REDACTED]

FILE:

[REDACTED]
MSC 06 047 13505
[REDACTED]

Office: LOS ANGELES

Date:

SEP 10 2009

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. 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, Los Angeles, California, 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 has submitted sufficient evidence to establish continuous residence in the United States since before January 1, 1982. Counsel provides additional evidence in support of the appeal.

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.

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

- An affidavit from [REDACTED] who indicated that the applicant “share the home for living” with her from 1984 to 1987. The affiant attested to the applicant’s moral character.
- An affidavit from [REDACTED] who indicated that the applicant resided with her from 1981 to 1984. The affiant attested to the applicant’s moral character.
- Earnings statements dated September 19 and 26, 1984 and March 6, 1986
- Receipts dated January 17, 1986, and during July 1986.
- Three appointment notices in September 1985 from [REDACTED] in San Juan Capistrano, California.
- Earnings statements from La Patisserie French Pastry & Deli for the periods ending August 15 and 25, 1985.
- Earnings statements from Monarch Bay Restaurant Corp, for the period ending October 21, 1984, November 4, 1984 and February 24, 1985.
- Earnings statements from El Torito, Inc., in Irvine, California for the periods ending October 21, and November 4 and 11, 1984.

A PS Form 3806, Receipt for Registered Mail postmarked April 1, 1985.

- An undated statement from [REDACTED] owner of R.C.A. Tax Service in Santa Ana, California, who indicated that he has known the applicant since September 1981. The affiant indicated that he has prepared the applicant's taxes and has become very good friends with the applicant.

The applicant also submitted earnings statements, receipts, and a California car registration dated during the requisite period. However, as the applicant's name was not listed on the documents they have no probative value.

The director determined 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 director concluded that the applicant had failed to submit sufficient credible evidence establishing his continuous residence in the United States since prior to January 1, 1982 and, therefore, denied the application on August 28, 2007.

On appeal, counsel submits:

- A document dated October 16, 2007, from the California Department of Motor Vehicles, which indicates that the applicant's driver license/identification card was issued to him on May 4, 1984.
- A 1988 wage and tax statement from BSHS Inc.
- An additional affidavit from [REDACTED], who indicated she and the applicant are from the same town in Morelos, Mexico, and that she was reacquainted with the applicant in May 1981 in California. The affiant indicated that in 1987 and 1988 she and the applicant each rented a room at a boarding house on Laguna Canyon in Laguna Beach, California.
- An additional affidavit from [REDACTED] who indicated that he met the applicant in 1981, has prepared the applicant's taxes, and often got together at dinners and family gatherings.

Regarding the California car registration issued to someone other than the applicant, counsel asserts that the applicant purchased the vehicle from the individual in 1983, but he was unable to register it in his name as he was not a registered licensed driver. Counsel asserts that the applicant is unable to provide any other documentation due to the passage of time.

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).

The statements issued by counsel on appeal have been considered. In this instance, the applicant submitted evidence, including contemporaneous documents, which tends to corroborate his claim of residence in the United States from May 1984 to March 1986. The AAO does not view the remaining 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 April 1984 and from April 1986 through the date he attempted to file his application as he has presented contradictory and inconsistent documents, which undermines his credibility.

indicates that the applicant resided with him from 1981 to 1984, but failed to state the place of residence during this period, provide details regarding the nature or origin of his relationship with the applicant or the basis for his continuing awareness of the applicant's residence.

in her initial affidavit, indicated that she and the applicant resided together from 1984 to 1987, but provided no address of residence for the applicant. In her subsequent affidavit, the affiant amended her affidavit to reflect that she and the applicant each rented a room at the same boarding home from 1987 to 1988 on Laguna Canyon in Laguna Beach, California. As conflicting statements have been provided, it is reasonable to expect an explanation from the affiant in order to resolve the contradictions. However, no statement from the affiant has been submitted to resolve her contradicting affidavits. Furthermore, the applicant did not claim on his initial or current Form I-687 application to have resided on Laguna Canyon in Laguna Beach in 1987 or 1988.

The California car registration has no evidentiary weight as no credible evidence has been provided to support counsel's assertion that the vehicle was sold to the applicant in 1983. The assertion of counsel does not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel indicates that the 1988 wage and tax statement is from Big Deal Bakery. The applicant, however, did not claim on his Form I-687 application to have been employed by this bakery in 1988. Although the applicant did claim on his application to have been employed by a bakery in 1988, the name and address of that bakery differs from the name and address listed on the wage and tax statement, and no evidence has been provided to establish that the bakeries are one and the same. Assuming, arguendo, the bakeries are one and the same, the wage and tax statement would only serve to establish that the applicant's employment occurred sometime in 1988; it does not establish that said employment occurred during the first or second quarter of 1988.

The addresses of residence claimed on the applicant's current Form I-687 application do not correspond with the addresses claimed on his initial Form I-687 application signed August 10, 1991.¹

¹ The applicant was assigned alien registration number

On his current application, the applicant claimed to have been absence from the United States from January 1987 to March 1987 and during October 1987, March 1988. However, along with his initial application, the applicant submitted a Form for Determination of Class Membership signed August 19, 1991. On this form, the applicant indicated that he departed the United States on January 11, 1988, by airplane to Mexico and reentered on January 27, 1988. The applicant's failure to disclose this absence on his current application is a strong indication that the applicant was outside the United States beyond the period of time allowed by regulation.

Along with his initial application, the applicant submitted a letter from [REDACTED], owner of [REDACTED] who indicated that the applicant was in her employ from 1981 to 1988 as a baker. Although the applicant claimed employment as a baker on his current application, [REDACTED] was not listed and his claimed employment as a baker did not occur until February 1984.

Along with his initial application, the applicant submitted an affidavit from an affiant, who claimed that the applicant resided with him during the requisite period in Los Angeles and Santa Ana, California. As previously noted, these addresses of residence contradict the addresses claimed on the applicant's current application.

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 numerous 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.