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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:



Office: ATLANTA

Date:

SEP 22 2009

MSC 05 358 12240

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, Atlanta, Georgia, 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 argues that the director denied the application without looking at the favorable factors of the application and evidence as required under the settlement agreement. Counsel requests that the application be reopened for lack of proper jurisdiction or due to lack of due process.

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 the time the applicant filed his Form I-687 application, he provided no documentation to establish continuous residence and physical presence in the United States during the requisite period. In response to a Notice of Intent to Deny dated March 14, 2007, counsel asserted that the settlement agreement states that applications should not be denied solely because applicants do not possess documentary evidence establishing class membership.

Counsel’s assertion is without merit as the basis for the Intent to Deny was the applicant’s failure to establish continuous residence not class membership. The director treated the applicant as a class member in adjudicating the Form I-687 application on the basis of whether the applicant had established continuous residence in the United States for the requisite period.

Counsel asserted that the director should take into account the passage of time and the applicant’s difficulties in obtaining corroborative documentation of unlawful residence. Counsel submitted a copy of the Newman Settlement Agreement.

The director, in denying the application, noted that the applicant had not provided any documentary evidence to establish continuous residence in the United States since prior to January 1, 1982.

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).

Section 11 of the Newman Settlement Agreement states, in pertinent part, "[f]ailure to provide evidence other than affidavits shall not be the sole basis for finding an alien failed to meet the continuous residence requirement."

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). Casting doubt to the applicant's claim that he resided in the United States continuously during the entire requisite period is the fact that, in the instant case, *no* documentary evidence including affidavits was provided by the applicant in an attempt to establish his continuous residence.

At the time the applicant filed his current Form I-687 application, counsel indicated that supporting documents were being submitted, which included a Form I-693, Medical Examination, and copies of the applicant's Form I-688B, Employment Authorization Card; passport; Affidavit to Determine Class Membership dated in 1989; Form I-690, Application for Waiver of Grounds of Excludability; FD-258, Fingerprint Card; a statement from his former counsel dated in November 1989; money orders address to the legacy Immigration and Naturalization Service; Form I-512, Authorization for Parole of an Alien dated October 7, 1993; Georgia driver's license issued in 2005; and initial Form I-687 application. These documents do not establish continuous residence in the United States during the requisite period.

As noted above, counsel submitted a copy of the applicant's passport, which reflects that it was issued on August 8, 1984, in Ahmedabad, India. The passport indicates that the applicant departed Bombay, India on September 27, 1985; entered Bangkok, Thailand with a visa on September 28, 1985 and departed October 2, 1985; entered Singapore on October 2, 1985 and departed October 6, 1985; and entered Bombay, India on October 7, 1985.

The passport raises questions to the credibility of the applicant's claim to have departed and reentered the United States in 1984, 1985 and 1987. On his Affidavit for Determination of Class Membership, the applicant indicated that he reentered the United States without inspection through the Canadian border. However, the applicant's passport, which was valid through May 17, 1989, does not reflect an entry into Canada in 1984, 1985 or 1987.

The absence of credible and probative documentation to corroborate the applicant's claim of continuous residence during the requisite period seriously detracts from the credibility of his claim. Pursuant to 8 C.F.R. § 245a.2(d)(5), the inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. Given the applicant's reliance upon documents that lacks probative value, it is concluded that the evidence submitted fails to establish continuous residence in an unlawful status 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 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.