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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] Office: SAN FRANCISCO Date:

AUG 09 2010

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.

Elizabeth McCormack

Perry Rhew
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, or *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 of the San Francisco office 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 (LULAC) Class Membership Worksheet. The director denied the application, finding 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 time period, based upon the applicant's testimony that he had a "voluntary deport" to Mexico for one week in 1982, 1983 or 1984. Therefore, the director concluded that the applicant voluntarily departed the United States under an order of deportation, and, therefore, failed to maintain continuous residence in the United States throughout the requisite statutory period.¹ The director found that, considering the documentation of record and the applicant's testimony, the applicant failed to establish continuous residence since January 1, 1982.

On appeal, counsel for the applicant asserts that the record does not support the director's finding that the applicant's voluntary departure from the United States was pursuant to an order of deportation. Counsel also asserts that the evidence which the applicant previously submitted establishes by a preponderance of the evidence that he continuously resided in the United States in an unlawful status for the duration of the requisite time period. Counsel has submitted a brief on appeal. The applicant has submitted additional evidence on appeal.² The AAO has considered counsel's assertions, reviewed all of the evidence, and has made a *de novo* decision based on the record and the AAO's assessment of the credibility, relevance and probative value of the evidence.³

The director based his decision upon the applicant's testimony at the time of his interview on the instant I-687 application, at which time the applicant stated, according to the notes of the interviewing officer, that in 1982 or 1983 he was sent back to Mexico, and that he "brought San Francisco signed paper returned to Mexico 1 week...came back.". The director also based his

¹An alien shall not be considered to have resided continuously in the United States, if, during any period for which continuous residence is required, the alien was outside of the United States under an order of deportation. Section 245A(g)(2)(B)(i) of the Act, 8 U.S.C. 1255(g)(2)(b)(i). A challenge to the Service's implementing regulations was dismissed in *Proyecto San Pablo v. INS, et al.*, (Civ. No. 89-456-TUC-WDB), June 18, 1997. Any alien who has departed from the United States while an order of deportation is outstanding shall be considered to have been deported in pursuance of law, except an alien who departed before the expiration of the voluntary departure time granted in connection with an alternate order of deportation shall not be considered to have been so deported. 8 C.F.R. § 241.7. Congress has provided no relief in the legalization program for failure to maintain continuous residence due to a departure under an order of deportation.

² The record reveals that the applicant's FOIA request [REDACTED] was processed on July 6, 1993. In addition, in response to the applicant's FOIA request [REDACTED] the applicant received a response on March 29, 1994, attaching records found responsive to the applicant's request. Further, the applicant's FOIA request [REDACTED] was processed on August 10, 2009.

³ The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

decision on the applicant's statements, in a class member worksheet dated October 26, 1992, that he had a "voluntary deport" in 1984, approximately, at which time he left the United States by autobus.⁴ In the initial I-687 application, filed in 1992 to establish the applicant's CSS class membership, and in the instant I-687 application, the applicant denied having been excluded or deported from the United States. The AAO finds that the record does not establish the director's finding that the applicant voluntarily departed the United States under an order of deportation during the requisite period, and, therefore, failed to maintain continuous residence in the United States throughout the requisite period. The evidence, however, does not establish that the applicant entered the United States prior to January 1, 1982 and remained in the United States throughout the requisite period.

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 physical presence under the CSS/Newman Settlement Agreements, the term "until the date of filing" in 8 C.F.R. § 245a.2(b) 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 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. 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 is permitted pursuant to 8 C.F.R. § 245a.2(d)(3)(vi)(L). To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from the applicant's 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).

⁴ The applicant's class membership worksheet was denied on October 26, 1992, based on the applicant's testimony that he had one departure from the United States in 1984, but no departures during the requisite period. The application for class membership was also denied because the applicant stated that he was never front-desked during the requisite period. The denial of the application for class membership did not find that the applicant voluntarily departed the United States during the requisite period under an order of deportation.

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. See 8 C.F.R. § 245a.2(d)(6). The weight to be given any affidavit depends on the totality of the circumstances, and a number of factors must be considered. More weight will be given to an affidavit in which the affiant indicates personal knowledge of the applicant's whereabouts during the time period in question rather than a fill-in-the-blank affidavit that provides generic information. The regulations provide specific guidance on the sufficiency of documentation when proving residence through evidence of past employment or attestations by churches or other organizations. 8 C.F.R. §§ 245a.2(d)(3)(i) and (v).

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. 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. *Matter of Ho*, 19 I & N Dec. 582, 591-592 (BIA).

The issue in this proceeding is whether the applicant has establish that he (1) entered the United States before January 1, 1982 and (2) has continuously resided in the United States in an unlawful status for the requisite period of time. The documentation that the applicant submits in support of his claim to have arrived in the United States before January 1982 and lived in an unlawful status during the requisite period consists of witness statements and documents. The AAO has reviewed each document in its entirety to determine the applicant's eligibility. Some of the evidence submitted indicates that the applicant resided in the United States after May 4, 1988; however, because evidence of residence after May 4, 1988 is not probative of residence during the requisite time period, it shall not be discussed.

The applicant has submitted statements from [REDACTED] who testified to their knowledge of the applicant's residence in the United States for the duration of the requisite period.

Although the witnesses claim to have personal knowledge of the applicant's residence in the United States during the requisite period, the witness statements 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 in the United States during the requisite period.

To be considered probative and credible, witness statements must do more than simply state that a witness 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 it probably did exist and that the witness, by virtue of that relationship, does have knowledge of the facts alleged. For instance, the witnesses do not state how they date their initial meeting with the applicant in the United States or specify social gatherings, other special occasions or social events when they saw and communicated with the applicant during the requisite period. The witnesses also do not state how frequently they had contact with the applicant during the requisite period. The witnesses do not provide sufficient details that would lend credence to their claimed knowledge of the applicant's residence in the United States during the requisite period. For these reasons the AAO finds that the witness statements do not indicate that their assertions are probably true.

In addition, the applicant submitted employment verification letters from [REDACTED]

[REDACTED] states that the applicant worked for [REDACTED] in Santa Rosa from February 1, 1979 to April 21, 1979, although the witness does not provide any details regarding the applicant's employment duties.

[REDACTED] and [REDACTED] state that the applicant was employed with [REDACTED] in Sonoma from May 17, 1979 until December 3, 1985 as a farm laborer. [REDACTED] lists the applicant's social security number as [REDACTED]

[REDACTED] states that the applicant worked for [REDACTED] in Sonoma between December 1985 and May 1986, although the witness does not provide any details regarding the applicant's employment duties.⁵

[REDACTED] states that the applicant worked for [REDACTED] in Sonoma from May 7, 1986 through the end of the requisite period, although the witness does not provide any details regarding the applicant's employment duties. [REDACTED] lists the applicant's social security number as [REDACTED]

The employment verification letters of [REDACTED] do not meet the requirements set forth in the regulations, which provide specific guidance on the sufficiency of documentation when proving residence through evidence of past employment. The regulation at 8 C.F.R. § 245a.2(d)(3)(i) provides that letters from employers must include: (A) Alien's address at the time of employment; (B) Exact period of employment; (C) Periods of layoff; (D) Duties with the company; (E) Whether or not the information was taken from official company records; and (F) Where records are located and whether the Service may have access to the records. If the records are unavailable, an affidavit-form letter stating that the alien's employment records are unavailable and why such records are unavailable may be accepted in lieu of subsections (E) and (F). The employment verification letters fail to comply with the above cited regulation because

⁵ The witness also states that [REDACTED] worked for him from February 10, 1997 through December 15,

they lack considerable detail regarding the applicant's employment. For instance, the witnesses do not state the applicant's daily duties or the number of hours or days he was employed. Furthermore, the witnesses do not state how they were able to date the applicant's employment. It is unclear whether they referred to their own recollection or any records they may have maintained. For these additional reasons, the employment verification letters are of little probative value.

The applicant has submitted a copy of a 1980 W-2 form from [REDACTED] Farm (TBF) in Sonoma, listing the applicant's social security number as [REDACTED], which the applicant testified was the social security number issued to him in 1978 in Santa Rosa.⁶ The W-2 also lists a post office box address in [REDACTED]. The applicant does not list a residence in El Verano, California in the instant I-687 application.

The record contains a copy of a 1981 W-2 form and a 1981 IRS statement of earnings from [REDACTED] listing the applicant's social security number as [REDACTED]. The W-2 form lists a post office box address in El Verano, California.

The applicant has submitted a 1982 W-2 form from [REDACTED] listing the applicant's social security number as [REDACTED]. The W-2 form lists a post office box address in El Verano, California.

The record contains 1991 federal and state income tax returns, listing earnings for 1983. The federal tax return lists a social security number, [REDACTED] which does not match the social security number listed in the instant I-687 application. The state income tax return states that the applicant rented a residence from 1980 to 1985 at 2 Willow Way in Sonoma. In the instant I-687 application, the applicant did not list a residence address at [REDACTED] during the requisite period. The federal adjusted gross income stated in the federal and state income tax returns, at numbers 16 and 12, respectively, do not match. Due to these inconsistencies, these documents will be given no weight.

The applicant has submitted a copy of a 1984 W-2 form from NTBF. The W-2 form lists the applicant's social security number as [REDACTED] and a post office box address in El Verano, California.

The record contains 1991 federal and state income tax returns, listing earnings for 1984. The tax returns do not list a social security number.

The applicant has submitted 1991 federal and state income tax returns, listing earnings for 1985. The tax returns do not list a social security number. The state income tax return states that the applicant rented a residence from 1980 to 1985 at [REDACTED]. As stated above, in the instant I-687 application, the applicant did not list a residence address at [REDACTED] during the requisite period. Due to these inconsistencies, these documents will be given no weight.

⁶ The record contains a copy of the front of a social security card in the name of [REDACTED] listing the number [REDACTED] and signed [REDACTED]

The record contains copies of quarterly wage reports from [REDACTED] from the quarter ending June 30, 1986 to the quarter ending October 1, 1986, and from the quarter ending December 31, 1986 through March 31, 1988, listing a social security number of [REDACTED] for the applicant. This social security number does not match the social security number listed in the instant I-687 application.⁷ Due to these inconsistencies, these documents will be given no weight.

The applicant has submitted 1986 W-2 forms from [REDACTED] in Sonoma, listing the social security number [REDACTED]. This social security number does not match the social security number listed in the instant I-687 application. The record contains a 1991 federal income tax return, listing earnings for 1986. The tax return does not list a social security number. The adjusted gross income on the tax return does not match the 1986 W-2 form statement of wages from [REDACTED]. Due to these inconsistencies, these documents will be given no weight.

The applicant has submitted a 1992 federal income tax return, listing 1987 earnings. The tax return does not list a social security number. The applicant has also submitted a copy of a 1987 W-2 form from [REDACTED] listing the social security number [REDACTED]. This social security number does not match the social security number listed in the instant I-687 application. Due to this inconsistency, this document will be given no weight.

The applicant has submitted a 1989 federal income tax return, listing 1988 earnings. The tax return does not list a social security number. The applicant has also submitted a 1988 W-2 form from [REDACTED], listing the social security number [REDACTED]. This social security number does not match the social security number listed in the instant I-687 application. Due to this inconsistency, this document will be given no weight.

While the documents listed above indicate that the applicant resided in the United States for some part of the requisite period, considered individually and together with other evidence of record, they do not establish the applicant's continuous residence for the duration of the requisite period. The inconsistencies regarding the applicant's social security number, as well as when the applicant resided at a particular location within the United States, are material to the applicant's claim in that they have a direct bearing on the applicant's residence 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 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. *Matter of Ho*, 19 I & N Dec. 582, 591-592 (BIA). Due to these inconsistencies, these documents will be given no weight.

⁷ In addition, in the quarterly wage reports from [REDACTED] from the quarter ending March 31, 1991, June 30, 1991, and from the quarter ending March 31, 1992 to the quarter ending December 31, 1992, the employer lists the applicant's social security number as [REDACTED]. While this social security number matches the social security number listed in the instant I-687 application, it is inconsistent with the social security number listed for the applicant in the majority of the quarterly wage reports from [REDACTED]. While outside of the requisite time period, these inconsistencies call into question the veracity of the applicant's testimony regarding his employment with [REDACTED] and, therefore, his continuous residence in the United States during the requisite period.

The remaining evidence in the record is comprised of copies of the applicant's statements, the instant I-687 application, and the initial I-687 application, filed in 1992 to establish the applicant's CSS class membership. The AAO finds in its *de novo* review that the record of proceedings contains materially inconsistent statements from the applicant regarding his absences from the United States.

In the instant I-687 application, the applicant listed one absence from the United States during the requisite period, in 1982.

In the initial I-687 application, the applicant did not list any absences from the United States since the date of his entry into the United States on August 9, 1978.

At the time of his interview on April 17, 2006, the applicant stated that he returned to Mexico in 1982 or 1983, and in 1987, each time for one week.

In a class member worksheet date October 26, 1992, the applicant listed one absence from the United States in 1984.

The contradictions are material to the applicant's claim in that they have a direct bearing on the applicant's residence in the United States for the duration of the requisite period. As stated above, 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. *Matter of Ho, supra*. The contradictions undermine the credibility of the applicant's claim of entry into the United States prior to January 1, 1982 and continuous residence in the United States during the requisite period. The applicant has failed to provide probative and credible evidence of his continuous residence in the United States for the duration of the requisite period. The inconsistencies regarding the dates of his absences from the United States are material to the applicant's claim in that they have a direct bearing on the applicant's residence 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 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. *Matter of Ho*, 19 I & N Dec. 582, 591-592 (BIA). These contradictions undermine the credibility of the applicant's claim of entry into the United States prior to January 1, 1982 and continuous residence in the United States during the requisite period.

Upon a *de novo* review of all of the evidence in the record, the AAO agrees with the director that the evidence submitted by the applicant has not established that he is eligible for the benefit sought. The various statements currently in the record which attempt to substantiate the applicant's residence and employment in the United States during the statutory period are not objective, independent evidence such that they might overcome the inconsistencies in the record regarding the applicant's claim that he maintained continuous residence in the United States throughout the statutory period, and thus are not probative. Therefore, the applicant the applicant has failed to establish by a preponderance of the evidence that he entered the United States before January 1, 1982 and continuously resided in an unlawful status in the United States for the requisite period. The applicant is, therefore, ineligible for temporary resident status on this basis.

The record reveals that on April 6, 1986, the applicant was charged with one count of violating section 23103 of the California Vehicle Code (VC), *Reckless Driving*. On March 25, 1992, the applicant was convicted of the charge, a misdemeanor. (California court number 49460, docket number 12895).

The record also reveals that on or about March 15, 2001, removal proceedings were instituted against the applicant as an alien present in the United States without having been admitted, pursuant to the Immigration and Nationality Act (Act), as amended, section 212(a)(6)(A)(i). Those proceedings are pending. The record of those removal proceedings is contained in administrative file number A75 743 703.

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 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*. In addition, the applicant has failed to establish his CSS class membership. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act.

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