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U.S. Citizenship
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Services

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[REDACTED]

FILE:

MSC 06 097 14165

Office: NEW YORK

Date:

MAR 19 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. The file has been returned to the National Benefits Center. 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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, 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 District Director (director) in New York City. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application on the ground that the applicant failed to establish his continuous residence in the United States in an unlawful status from before January 1, 1982 through the date of attempted filing during the original one-year application period that ended on May 4, 1988. The director noted that the applicant submitted an affidavit that was notarized by a notary, [REDACTED] whom the Service had investigated and determined to be a supplier of fraudulent documents to applicants.

On appeal, counsel for the applicant reasserts that the applicant has submitted sufficient evidence to establish the requisite continuous residence. Regarding the document notarized by [REDACTED] counsel states that the applicant cannot be held responsible because an affiant “inadvertently” had an affidavit notarized by a “fraudulent notary.” Counsel also states that the applicant could not provide evidence of his entry about twenty-five years ago.

An applicant for temporary resident status – under section 245A of the Immigration and Nationality Act (the Act) – 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. *See* 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. *See* 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. *See* 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)(1) 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. *See* 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 period, 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).

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.* at 80. 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 has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421, 431 (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.

Although the regulations provide an illustrative list of contemporaneous documents that an applicant may submit, the list also permits the submission of affidavits and any other relevant document. *See* 8 C.F.R. § 245a.2(d)(3)(vi)(L).

The regulation at 8 C.F.R. § 245a.2(d)(3)(i) states that letters from employers attesting to an applicant’s employment must: provide the applicant’s address at the time of employment; identify the exact period of employment; show periods of layoff; state the applicant’s duties; declare whether the information was taken from company records; and identify the location of such company records and state whether such records are accessible or in the alternative state the reason why such records are unavailable.

The applicant, a native of Bangladesh who claims to have resided in the United States since December 1981, filed his application for temporary resident status under section 245A of the Act (Form I-687), together with a Form I-687 Supplement, CSS/Newman (LULAC) Class Membership Worksheet, at the New York District Office on January 5, 2006.

In the Notice of Intent to Deny (NOID), dated April 4, 2007, the director notified the applicant that the evidence submitted was insufficient to establish the applicant’s continuous unlawful residence in the United States from before January 1, 1982 through the date of attempted filing during the original one-year application period that ended on May 4, 1988. **The director noted that the applicant had submitted fraudulent documentation notarized by _____ who had been a**

subject of a fraud investigation, and who had been determined to provide fraudulent affidavits to applicants. The director granted the applicant thirty (30) days to submit additional evidence.

The response to the NOID consisted of a letter from the applicant's attorney, an affidavit from the applicant, and a new affidavit from [REDACTED], dated April 30, 2007. In his letter the applicant's attorney stated that the envelopes provided are credible and amenable to verification, and therefore, should be considered strong primary evidence. Counsel also stated that the director did not explain why the letter notarized by [REDACTED] was considered fraudulent.

In the Notice of Decision, dated March 4, 2004, the director denied the application noting that the applicant responded to the NOID, but failed to overcome the reasons for denial stated in the NOID. The director noted that envelopes provided by the applicant are not probative because they do not bear a United States postmark; and, the affidavit from [REDACTED] does not establish the applicant's continuous residence throughout the requisite period as he attests only to the applicant's presence in the United States beginning in 1985.

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 issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that he 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 during the original one-year application period that ended on May 4, 1988. The AAO determines that he has not.

The record does not contain sufficient primary evidence that the applicant resided in the United States during the requisite period. The applicant has submitted letters of employment, and affidavits and reference letters. The AAO reviewed the entire record. Here, the submitted evidence is not relevant, probative, and credible

Employment Letters

The applicant submitted a copy of a message note from [REDACTED], located at [REDACTED] Hempstead, New York 11550. The February 25, 1991 message note states that the applicant had been employed part-time at the company's Jamaica branch from December 1981 until January 1985, and was paid \$75.00 per week. It is not clear who signed the message note, and there is no indication of the capacity of the writer or signer of the note, or the capacity in which the applicant was employed. Also, the message note is not original company letterhead.

The applicant also submitted a letter of employment from [REDACTED], located at [REDACTED] New York, N.Y. 10016. The undated letter which was notarized on February 27, 1991, states that the applicant had been employed as a messenger from March 1985 to June 1990.

It is noted that the letters failed to show periods of layoff, declare whether the information was taken from company records, and identify the location of company records and state whether such records are accessible or in the alternative state the reason why such records are unavailable as required under 8 C.F.R. § 245a.2(d)(3)(i).

Affidavits & letters

The applicant submitted the following:

1. A letter from [REDACTED] dated October 25, 1990, stating that applicant lived with him and was under his guardianship and he partially supported the applicant financially from 1981 to 1984. Mr. [REDACTED] however, does not specify the address where the applicant resided with him during that time, how and why the claimed relationship, including his financial responsibility towards the applicant for several years came about, or when in 1984 the claimed shared residence ended, and whether the applicant was a continuous resident during that time.
2. A letter from [REDACTED], dated November 1, 1989, stating that the applicant lived with him from 1985 to October 31, 1989. Mr. [REDACTED] however, does not indicate the address where the applicant resided with him during that time, or when in 1985 the claimed shared residence began.
3. An affidavit from [REDACTED], notarized by [REDACTED]. Ms. [REDACTED] states that she is a friend of the applicant and that he rented an apartment in the basement of her building, located at [REDACTED] Woodside, New York 11377, from December 1981 until June 1983.
4. A letter from [REDACTED], notarized on February 13, 1991, stating that in March 1983 she went to Kennedy Airport to pick up the applicant who was arriving from Bangladesh, and during that period the applicant resided at [REDACTED] Woodside, New York 11377.
5. A handwritten letter from [REDACTED] dated February 27, 1991, stating that in 1981 he had examined the applicant at his office in Jamaica, Queens, for a general check-up.

The applicant also submitted three postal envelopes addressed to him in New York. One of the envelopes has an unclear postal stamp, and the others bear postal stamps in 1984, and 1985 respectively. However, the envelopes do not bear U.S. postmarks, and are therefore not probative.

It is noted that none of the affiants state how they dated their acquaintance with the applicant, or how frequently and under what circumstances they met the applicant. As stated previously, the evidence must be evaluated not by the quantity of evidence alone but by its quality. Although not required, none of the affiants included any supporting documentation of the affiant's presence in the United States during the requisite period. 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.

Contrary to counsel's assertion, the applicant has failed to submit sufficient credible evidence to establish his continuous residence in the United States during the requisite period. The applicant has submitted questionable documentation. Specifically, as noted by the director, the applicant submitted an affidavit that is notarized by [REDACTED] who had been a subject of a fraud investigation, and who has been determined to have provided fraudulent affidavits to applicants. The affidavit in question is from [REDACTED] who attests that she is the friend of the applicant, and the applicant rented an apartment in the basement of her building, located at [REDACTED] [REDACTED] from December 1981 until June 1983. It is noted that the [REDACTED] affidavit contradicts a letter from [REDACTED]. Ms. [REDACTED] states that the applicant rented an apartment from December 1981 until June 1983, thereby indicating that the applicant (who was 16 years old in December 1981) had his own apartment. However, [REDACTED] states that applicant lived with him, was under his guardianship and he partially supported the applicant financially, from 1981 to 1984. In addition, Service records show [REDACTED]'s entry date into the United States to be September 18, 1989. Therefore, he cannot attest to the applicant's presence in the United States since 1981. These discrepancies cast considerable doubt on whether these affidavits are genuine.

The applicant has failed to provide any explanation for these discrepancies. Counsel asserts that the applicant cannot be held responsible for the affidavit notarized by [REDACTED] because the affiant "inadvertently" had an affidavit notarized by a "fraudulent notary." Counsel, however, does not submit any documentation, such as a statement from [REDACTED], in support of his assertion. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. 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). Furthermore, as noted above, Ms. [REDACTED] affidavit is inconsistent with the affidavit submitted by [REDACTED] as the affiants indicate conflicting residence arrangements for the applicant during the period from December 1981 through June 1983.

Also, as noted above the notary, [REDACTED] has been implicated in immigration-related fraudulent activities, and it is unlikely that any of his "notarized" documents are valid. Therefore,

the affidavit submitted by the applicant in support of his application that was notarized by [REDACTED] is not probative given the evidence of record pointing to [REDACTED] involvement in providing fraudulent affidavits to immigration applicants.

These unresolved discrepancies cast considerable doubt on whether the applicant's claim that he entered the United States before January 1, 1982, and resided continuously in an unlawful status in the United States during the requisite period, is true. 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. It is incumbent upon the 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 lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). Therefore, the reliability of the remaining evidence offered by the applicant is suspect. In view of these substantive shortcomings, the AAO finds that the evidence of record has little probative value. It is not persuasive evidence of the applicant's continuous unlawful residence in the United States from before January 1, 1982 through the date of attempted filing during the original one-year application period that ended on May 4, 1988.

Based on the foregoing analysis of the evidence, the AAO concludes that the applicant has failed to establish that he entered the United States before January 1, 1982 and resided continuously in the United States in an unlawful status from that date through the date he attempted to file a Form I-687 during the original one-year application period that ended on May 4, 1988. Accordingly, the applicant is ineligible for temporary resident status under section 245A(a)(2) the Act.

The appeal will be dismissed, and the application denied.

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