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U.S. Citizenship
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FILE: MSC 06 069 13251

Office: LOS ANGELES

Date: FEB 12 2008

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: SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. The file has been returned to the office that originally decided your case. If your appeal was sustained, or if your case 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.

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, Los Angeles. The decision 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 also observed that the applicant failed to disclose his 1980 arrest and conviction for burglary during his interview with a Citizenship and Immigration Services (CIS) officer. 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. It is noted that the director adjudicated the Form I-687 application on the merits. As a result, the director is found not to have denied the application for class membership.

On appeal, the applicant said that he previously did not recall his arrest, which he states was a misdemeanor. He also seeks to clarify his testimony with respect to his filing of a Form I-687 during the original legalization application period. He indicates that he requested the court record for his conviction and indicates that he will submit additional documents within 90 days. The applicant filed his appeal on July 18, 2006. As of this date, no additional evidence has been submitted and the record will be considered complete.

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)(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. 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 petitioner 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, 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.

At issue in this proceeding is whether the applicant has submitted sufficient credible evidence to meet his or her 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 shows that the applicant submitted a Form I-687 application and supplement to Citizenship and Immigration Services (CIS) on December 8, 2005. The applicant signed this form under penalty of perjury, certifying that the information he provided is true and correct. At part #30 of the Form I-687 application where applicants were asked to list all residences in the United States since first entry, the applicant indicated that he lived at "various addresses" at "various" locations from 1979 to December 2003. Similarly, the applicant indicated at part #33 of the Form I-687 that he worked for "various employers at various locations" during this same period of time.

The applicant's administrative record also contains a Form I-687 application signed by the applicant on August 27, 1990. At that time, he indicated that he resided at [REDACTED] in Oxnard, California from January 1981 until December 1985, and at [REDACTED] beginning in January 1986. He also indicated previous addresses at Kalluga Street in Salinas, California, from 1979 to October 1980, and at [REDACTED] from November 1980 to December 1980.

On his previous Form I-687, the applicant provided the following information regarding his employment during the requisite period:

L.D.S. Harvesting – 1979 to 1980
West Valley Packing Co. – November 1980 to October 1983
Lupitas Pillow – January 1984 to December 1985
Sublimation Design – January 1986 to December 1988

The applicant indicated on his previous Form I-687 that he has also utilized the name [REDACTED]

Pursuant to 8 C.F.R. § 245a.2(d)(6), to meet his burden of proof, an applicant must provide evidence of eligibility apart from his own testimony. The regulation at 8 C.F.R. § 245a.2(d)(3) provides an illustrative list of documentation that may be provided to establish proof of continuous residence in the United States during the requisite period. This list includes: past employment records; utility bills; school records; hospital or medical records; attestations by churches, unions or other organizations; money order receipts; passport entries; birth certificates of children; bank books; letters or correspondence involving the applicant; social security card; selective service card; automobile receipts and registration; deeds, mortgages or contracts; tax receipts; and insurance policies, receipts, or letters. An applicant may also submit “any other relevant document.” 8 C.F.R. § 245a.2(d)(3)(vi)(L).

The applicant submitted the following evidence in support of his application:

- A copy of an affidavit dated July 23, 1990 from [REDACTED] who stated that he has been friends with the applicant since they lived in Mexico. [REDACTED] stated that the applicant came to Oxnard in 1981 to live in [REDACTED]'s home, located at [REDACTED] in Oxnard, California, and that he did not pay rent. He stated that the applicant lived there until 1985. While [REDACTED] confirmed that the applicant resided with him at this address for the period stated on the applicant's previous Form I-687, he does not claim to have any direct, personal knowledge of the applicant's residence in the United States subsequent to 1985. Although not required to do so, [REDACTED] did not provide evidence of his identity or evidence that he resided at the stated address during the requisite period. Further, as discussed further below, the applicant indicated during his interview that he resided with a [REDACTED] in Salinas, California for four or five years, from approximately 1981 or 1982. This testimony appears to be inconsistent with Mr. [REDACTED] statement that the applicant resided with him from 1981 to 1985. Accordingly, this affidavit is lacking in credibility and probative value.

A copy of an affidavit dated July 2, 1990 from [REDACTED] who stated that he has personal knowledge that the applicant has resided in Los Angeles, California since May 1979. He stated that he has known the applicant for a long time and knows that he has been working under the name [REDACTED] did not indicate how, where or under what circumstances he first met the applicant, how he dates his acquaintance with the applicant, or how frequently he had contact with the applicant during the requisite period. He does not indicate what his relationship with the applicant is, nor does he provide any events or details of the applicant's residence in the

United States that would tend to lend credibility to his claim that he has direct, personal knowledge of the events to which he is attesting. Although not required to do so, it is noted that [REDACTED] did not provide proof of his identity or evidence that he resided in the United States during the requisite period. He also did not provide a telephone number where he could be contacted for verification. For these reasons, this affidavit is lacking in probative value.

- A copy of an affidavit dated August 22, 1990, which states: "I, [REDACTED] verify [sic] that I have been working with the name of [REDACTED] [M]y place of employment was L.D.S. Custom Harvesting, Lupita's Pillows & Sublimation Design from 1980 to 1988." However the final portion of the affidavit reads: "I, [REDACTED] verify under penalty of perjury that I and the above mentioned are one and the same person." The affidavit appears to be signed by [REDACTED], not by the applicant. This document, therefore, does not support the applicant's assertion that he utilized the assumed name [REDACTED]
- Pay stubs issued under the name [REDACTED] which included: a pay stub dated October 23, 1980, from L.D.S. Custom Harvesting in Holtville California; a pay stub dated November 24, 1980 from West Valley Packing Co.; pay stubs dated April 12, 1985 and November 11, 1985, from Lupita's Pillows; and pay stubs dated February 7, 1986 and July 5, 1988 from Sublimation Design, Inc.
- An original check-cashing card from M& R Department Store, issued to [REDACTED] residing at [REDACTED] in Salinas, California. There is no date of issuance included on the card. The card identifies the cardholder's employer as [REDACTED]. The portion of the card containing the cardholder's date of birth is illegible due to wear. There is a small color photograph on the card, which appears that it could be the applicant, and the physical description included on the card (height, eye and hair color) is consistent with information provided by the applicant. However, it is noted that the applicant did not indicate on either of his Forms I-687 that he ever resided at "40 Peach" in Salinas, nor did he indicate that a [REDACTED] employed him.

The applicant was interviewed under oath by a Citizenship and Immigration Services (CIS) officer on June 19, 2006. At that time, the applicant testified under oath that he first entered the United States illegally in 1979 and resided with his brother, [REDACTED] and his brother's girlfriend, [REDACTED] in Los Angeles, California for three years. The applicant stated that he then moved to Salinas, California and lived with a friend, [REDACTED] for four or five years. He stated that he had lost contact with [REDACTED] and stated that [REDACTED] is his brother-in-law. The applicant did not provide any additional evidence in support of his application at the time of his interview.

It is noted that the testimony provided by the applicant during his interview does not appear to be consistent with the detailed residence history indicated on the applicant's previous Form I-687 prepared in 1990. The applicant did not indicate on his previous Form I-687 that he lived in Los Angeles, or that he stayed at one address during his first three years in the United States. He also did not indicate that he resided in Salinas for four to five years. Furthermore, the applicant's testimony that he resided with Jesus

Bermudes is inconsistent with the testimony of ██████████, who stated that the applicant lived with him in Oxnard from 1981 to 1985. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

During his interview, the applicant was also asked several times whether he had ever been arrested and responded that he had not been. However, the applicant's Federal Bureau of Investigation (FBI) identification record shows that he was arrested for burglary in California on June 25, 1980, and convicted of burglary, in violation of Section 459 of the California Penal Code, on August 20, 1980.

The director denied the application on June 20, 2006. In denying the application, the director acknowledged the applicant's testimony and the evidence submitted, but found that that the applicant had failed to show by a preponderance of the evidence that he resided in the United States for the duration of the requisite period. The director specifically referenced the applicant's failure to acknowledge his arrest for burglary in 1980.

On appeal, the applicant asserts that he has resided in the United States since 1979. He states that at the time of his interview, he did not recall his only arrest for burglary, which he states was a misdemeanor. As noted above, the applicant indicated that he would submit a court record and additional documents within 90 days, but no additional evidence has been received as of this date.

As is stated above, 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). The regulations allow the applicant to submit a broad range of documents to satisfy his burden of proof. See 8 C.F.R. § 245a.2(d)(3). With the exception of the pay stubs submitted for 1985 and 1986, the applicant has not submitted any contemporaneous evidence of his residence in the United States during the requisite period. The affidavit from ██████████ is so significantly lacking in detail that it can be given only minimal probative value, while the affidavit from ██████████ is not consistent with testimony provided by the applicant during his interview. Therefore, the applicant has not demonstrated with relevant, credible and probative evidence that his claim is probably true pursuant to *Matter of E-M-*, *supra*.

The absence of sufficiently consistent, detailed, and credible documentation to corroborate the applicant's claim of continuous residence for the entire requisite period seriously detracts from the credibility of this 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 with minimal probative value, it is concluded that he has failed to establish continuous residence in an unlawful status in the United States for the requisite period 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.

Beyond the decision of the director, it is noted that an applicant who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment to temporary resident status. Section 245A(a)(4)(B) of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1255a(a)(4)(B). The regulations provide relevant definitions at 8 C.F.R. § 245a.

“Misdemeanor” means a crime committed in the United States, either (1) punishable by imprisonment for a term of one year or less, regardless of the term actually served, if any; or (2) a crime treated as a misdemeanor under 8 C.F.R. § 245a.1(p). For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. 8 C.F.R. § 245a.1(o).

“Felony” means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term actually served, if any. There is an exception when the offense is defined by the state as a misdemeanor and the sentence actually imposed is one year or less, regardless of the term actually served. Under this exception, for purposes of 8 C.F.R. § 245a, the crime shall be treated as a misdemeanor. 8 C.F.R. § 245a.1(p).

The record shows that the applicant was convicted of burglary in violation of Section 459 of the California Penal Code on August 20, 1980, and that he was sentenced to 24 months probation. The applicant states that he was convicted of a misdemeanor, but he has not provided evidence of the final court disposition. Pursuant to Section 461 of the California Penal Code, burglary is punishable as follows:

1. Burglary in the first degree: by imprisonment in the state prison for two, four, or six years.
2. Burglary in the second degree: by imprisonment in the county jail not exceeding one year or in the state prison.

Without the applicant's court record, it cannot be determined whether the applicant's conviction was for burglary in the second degree, a misdemeanor, or for burglary in the first degree, a felony. The burden is on the applicant to provide affirmative evidence that he is eligible for the benefit sought. For this additional reason, the applicant has not established that he is eligible for status as a temporary resident.

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