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U.S. Citizenship
and Immigration
Services

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FILE:

MSC 06 031 14480

Office: LOS ANGELES

Date: **JAN 15 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:



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.

A handwritten signature in black ink, appearing to read "D. King".

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, on October 31, 2005. The director denied the application on two separate grounds. First, the director determined that the applicant was ineligible to adjust to temporary resident status pursuant to 8 C.F.R. § 245a.2(c)(1) because he had been convicted of three misdemeanors in the United States. See section 245A(a)(4)(B) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1255a(a)(4)(B). The director further 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 found 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 for the applicant states that the determination that the applicant was convicted of three misdemeanors is not supported by the evidence. Counsel asserts that reports from the Federal Bureau of Investigation (FBI) and California Department of Justice reflect that the applicant has no criminal record, while the Superior Court of California, County of Orange, has issued a report indicating that the copies of requested requested "are no longer maintained by this court." Counsel states that the only available record, a final disposition from the Municipal Court, Whittier, County of Los Angeles, California, Case No. 7 WH03315, shows one misdemeanor conviction as a result of an April 1997 arrest. Counsel acknowledges that this final disposition alleges a prior arrest on two charges and two convictions, but emphasizes that there is no evidence to confirm that the allegations are true, particularly since the FBI and California Department of Justice report show no record. Counsel asserts that without court records substantiating these allegations, there can be no conclusion that the applicant has three misdemeanor convictions.

Counsel further addresses the second grounds for denial of the application, and asserts that the circumstances of the applicant's interview with a CIS officer led to inadequate communication and resulted in incorrect conclusions with respect to the applicant's continuous residency in the United States.

The first issue to be examined is whether the applicant's criminal convictions render him ineligible to adjust to temporary residence status under the provisions of the section 245A of the Act. An alien who is convicted of a felony, or three or more misdemeanors, is ineligible for temporary resident status. 8 C.F.R. § 245a.2(c)(1).

"Felony" means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any, except 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 such alien actually served. Under this exception, for purposes of 8 C.F.R. Part 245a, the crime shall be treated as a misdemeanor. 8 C.F.R. § 245a.1(p).

"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 such alien 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).

Under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, no effect is to be given, in immigration proceedings, to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction. An alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). "State rehabilitative actions which do not vacate a conviction on the merits or on any ground related to the violation of a statutory or constitutional right in the underlying criminal proceeding are of no effect in determining whether an alien is considered convicted for immigration purposes." *Id.* at p. 528.

The Board of Immigration Appeals (BIA) has sought to clarify and further expand on this holding as it is asked to review different types of post-conviction relief orders obtained by aliens subject to removal proceedings. In its most recent decision on the issue, the BIA, in *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), clarified that it was drawing a distinction between state court actions to vacate a conviction where the reasons were solely related to rehabilitation or to ameliorate immigration hardships, as opposed to state court actions based upon having found procedural or substantive defects in the underlying criminal proceedings. The BIA found that where the action is taken to address a procedural or substantive defect in the criminal proceedings, the conviction ceases to exist for immigration purposes, but where the underlying purpose is to avoid the effect of the conviction on an alien's immigration status, the court's action does not eliminate the conviction for immigration purposes. *Id.* at p. 624.

The applicant has submitted a record from the Municipal Court of Whittier Judicial District, Los Angeles County, California reflecting that the applicant was convicted of a misdemeanor violation of section 23152(b), Driving with a Blood Alcohol Content of 0.08 Percent or More by Weight, of the California Vehicle Code, with case number 7 WH03315, on May 9, 1997. This same records also shows two alleged prior misdemeanor convictions, one for the same offense, and one for a violation of section 23152(a) of the California Vehicle Code, Driving Under the Influence of Alcohol/Drugs, on December 27, 1990 in West Orange County Municipal Judicial District, and provides a partial case number. The court record reflects that the applicant admitted the two prior convictions during his arraignment on May 9, 1997. Further, it is noted that during his interview with a CIS officer on April 26, 2006, the applicant stated that he was arrested for driving under the influence of alcohol in 1990 and in 1997.

The director set forth the information regarding the prior convictions in the denial notice. On appeal, the applicant has not denied the two prior misdemeanor convictions. Rather counsel for the applicant asserts there is insufficient evidence that such convictions occurred as they are listed as "alleged" convictions in the court records. It is noted that a report issued by the Superior Court of California, Orange County on March 25, 2005, does not indicate that no criminal record was found, only that the records requested by the applicant are no longer maintained by the court under Government Code §68152(d) which mandates that misdemeanor records for violations of section 23152 of the California Vehicle Code be destroyed seven (7) years after final disposition. The implication of this report is that the applicant did in fact have at least one misdemeanor conviction in Orange County, California prior to March 1998. The court advised that information on records that had been destroyed could be obtained from the California Department of Justice, Bureau of Criminal Identification. There is no evidence that the applicant attempted to contact this office to further inquire about the availability of his court record.

In addition, it is noted that the applicant offers no explanation as to the outcome of his admitted 1990 arrest for driving under the influence of alcohol. The only evidence in the record related to this 1990 arrest is the 1997 record from the Municipal Court of Whittier Judicial District, which indicates that the applicant admitted under oath that he had two prior misdemeanor convictions in December 1990 for violations of sections 23152(a) and 23152(b) of the California Vehicle Code. The fact that his records have been destroyed does not mean the applicant was not convicted or that a conviction was dismissed or vacated on its merits. The burden is on the applicant to provide affirmative evidence that he is eligible for the benefit sought.

The AAO acknowledges that the applicant submitted reports from the FBI and California Department of Justice showing that no arrest or criminal record was found for him. The FBI and California Department of Justice "rap sheets" list only information reported to it by local and state law enforcement agencies. The fact that an offense has not been reported to these agencies does not establish that the charges have been dismissed or were in error. Since the applicant admits to two arrests and has submitted court records which indicate that the applicant has one misdemeanor and has admitted under oath to two prior misdemeanor convictions, the FBI and California Department of Justice reports are insufficient to establish that applicant's eligibility under 8 C.F.R. § 245a.2(c)(1).

Because the record shows that the applicant has been convicted of three misdemeanor offenses, the director properly concluded that the applicant is ineligible for adjustment to temporary resident status. Within the provisions of section 245A of the Act, there is no waiver available to an alien convicted of a felony or three or more misdemeanors committed in the United States.

The second issue this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that he resided continuously in the United States for the duration of 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)(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).

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 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 (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.

Here, the submitted evidence is not relevant, probative, and credible.

The record shows that the applicant submitted a Form I-687 Application and Supplement to Citizenship and Immigration Services (CIS) on October 31, 2005. 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 showed that he resided at: (1) [REDACTED], Pico Rivera, California from April 1979 until August 1979; (2) [REDACTED] in Pico Rivera, from September 1979 until November 1980; and (3) 9232 and [REDACTED] in Pico Rivera from 1980 until December 1988. The applicant indicates that he utilized a

mailing address of [REDACTED] in Pico Rivera, California from 1986 until June 1987.¹ At part #33, where applicants are asked to list all employment in the United States, the applicant stated that he was employed by Fat Bob's Concrete Pumping in La Puente, California from February 1985 until July 1990. He states that he served as a laborer for various employers between February 1979 and February 1985, and that he has been self-employed as a gardener since 1983. The applicant stated at part #32 that his only absences from the United States since his entry were trips to Mexico in September 1985 and in August 1987.

In an attempt to establish continuous unlawful residence in this country since prior to January 1, 1982, the applicant provided the following evidence:

- Affidavit of [REDACTED] who states that he met the applicant in late 1979, when he encountered the applicant performing "brick labor" at residences in his neighborhood in Pico Rivera, California, and requested his telephone number so that he could contact him to perform similar work for the affiant. He stated that the applicant's address at that time was with the affiant's neighbor [REDACTED]." Mr. [REDACTED] states that he saw the applicant again in mid-1980, when the applicant was performing brick work for his neighbor "[REDACTED]" who resided at the corner of [REDACTED] and [REDACTED]. He states that he saw the applicant doing brick masonry "periodically" during "the next few years," and recalled that he was staying in the garage of a residence at [REDACTED] in Pico Rivera while performing work at that address. He notes that he has knowledge of two other masonry projects the applicant worked on during 1983 on [REDACTED], for his neighbors [REDACTED] and [REDACTED]. Mr. [REDACTED] states that he hired the applicant to perform masonry jobs at his own house at [REDACTED] in January 1984, mid-1984, and June 12, 2005. Finally, the affiant states that since 1984, he has seen the applicant in intervals of no less than two months apart, and that he knows the applicant has been residing in the United States continuously because the applicant "has always lamented the fact that he was unable to leave the country to be with his family" in Mexico.

Here, the affiant's statement does not establish that he had direct, personal knowledge of the applicant's continuous residence in the United States, particularly prior to 1984, when there were significant gaps between his claimed contacts with the applicant. Mr. [REDACTED] does not indicate that he saw the applicant more than five times between 1979 and 1984, and provides no details of

¹ The record reflects that in a previous Form I-687 application filed by the applicant in 1990, the applicant stated that he lived at [REDACTED] in Pico Rivera, California from February 1979 until October 1986; at [REDACTED] from October 1986 until November 1988. 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). Doubt cast on any aspect of the applicant's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the application. *Id.*

the events and circumstances of the applicant's residence in the United States since 1984. The only specific address of residence of which the affiant claims to have knowledge, [REDACTED], is not listed on the applicants' Form I-687. With respect to [REDACTED] claims that the applicant resided with [REDACTED], " it is noted that the administrative record includes an affidavit executed by [REDACTED] in 1990, in which he stated that the applicant resided with him at [REDACTED] from 1979 to 1986; however, this address is not among the applicant's claimed residences in the United States as listed on his current Form I-687.

[REDACTED]'s affidavit was accompanied by evidence that Mr. Rodriguez, an attorney, has previously represented the applicant in an unrelated U.S. citizenship matter in 1985-1986. The documentation includes various correspondence prepared by Mr. Rodriguez during this time in connection with his efforts to obtain proof that the applicant's father was born in the United States. This correspondence includes a letter from Mr. Rodriguez to the applicant dated December 6, 1985, which is addressed to the applicant in Aguascalientes, Mexico. Mr. Rodriguez noted in the letter that he would be sending to the applicant forms for his father to sign to file immigrant petitions for the applicant and his brother. This evidence suggests, at a minimum, that the applicant was absent from the United States in December 1985, an absence that is not indicated on the applicant's Form I-687. It is also unclear why Mr. Rodriguez did not reveal in his statement that the applicant was his client in a legal matter during the 1985-1986 period.

Because of the ambiguities and inconsistencies noted, Mr. Rodriguez's affidavit can be given limited weight in establishing the applicant's continuous residence for the duration of the requisite period.

- A letter from [REDACTED] who states that he allowed the applicant to live in his home at [REDACTED] in Pico Rivera, California from September 1979 until November 1980. He states that the applicant paid no rent but did brick work around the affiant's home. The letter is neither dated nor notarized, nor did [REDACTED] provide proof of his identity or evidence of his residence in the United States during the time period in question. [REDACTED] did not state that he had any knowledge of the applicant's residence in the United States during the requisite period. Moreover, it is noted that the applicant's record contains a notarized affidavit executed by Mr. [REDACTED] on July 9, 1990 in which he stated that the applicant resided at [REDACTED] in Pico Rivera, California from February 1978 until July 1990. No explanation has been provided for [REDACTED] inconsistent testimony. Based on these deficiencies, his statement carries no weight in establishing the applicant's continuous residence in the United States during the requisite period.

A letter from [REDACTED] dated May 25, 2004, who states that he has known the applicant since "about 1985." He states that he met the applicant when he was working for a neighbor of his parents. [REDACTED] states that he has been in touch with the applicant since that time, has hired him to do several projects for houses that he has owned, and considers him to be a good friend. Mr. [REDACTED]'s statement is not notarized, and he does not indicate how frequently he had contact with the applicant, or provide an address at which the applicant resided during the requisite period. The

statement is vague and is significantly lacking in details that would lend credibility to the claimed relationship of 19 years. This letter can be given limited weight in establishing the applicant's residence in the United States subsequent to 1985, and no weight in establishing his entry prior to January 1, 1982 and continuous residence in the U.S. prior to 1985.

- A copy of an envelope addressed to "[REDACTED]" in Mexico, showing the applicant's name as the sender, and an address of [REDACTED] in Pico Rivera, California. The envelope bears a postmark dated June 27, 1979. While this envelope appears to show that the applicant was in the United States in 1979, it does not assist in demonstrating his continuous residence in this country for the duration of the requisite period.
- Four receipts issued to the applicant for gardening and masonry work, dated March 1982, July 1983, July 13, 1984, and May 10, 1985, indicating that the applicant was paid in cash.
- Thirteen post office receipts for registered mail addressed to recipients in Mexico, all of which identify the applicant as the sender. Twelve of the 13 receipts show the applicant's address as [REDACTED] Pico Rivera, California. The receipts are dated between October 1986 and December 9, 1988.

The applicant was interviewed by a CIS officer in connection with his application for temporary residence on April 26, 2006. The records shows that the interview, scheduled for 7:00 a.m., was held at 1:00 p.m. due to a car accident on the morning of the interview which involved the applicant's attorney. The applicant's interpreter, who had accompanied him to the interview, was not available at 1:00 on that date and the record shows that the applicant opted to conduct the interview in English rather than re-schedule the interview. The applicant's attorney was present at the interview.

During his interview, he testified under oath that he entered the United States for the first time in 1979 and has been out of the country only two times, in 1985 for one week, and in August 1987, for two weeks. He stated that he was married in Mexico in 1973, and that his wife never came to the United States. The applicant testified that he has three children born in Mexico in 1981, 1982 and 1984. The record indicates that the CIS officer, noting the dates of birth of the applicant's children, questioned whether the applicant had been in Mexico on any other occasions, or whether the applicant's spouse had been in the United States.

When questioned, the applicant presented a notarized declaration signed by [REDACTED] on August 31, 1990. [REDACTED] stated that he met the applicant in Pico Rivera, California in February 1978, when he first came to the United States, and that he resided with [REDACTED] at [REDACTED]. It is noted that on his Form I-687 filed in 2005, the applicant does not claim to have been in the United States in 1978 and does not claim to have lived at this address at any time. [REDACTED] states that the applicant's spouse was in the United States for two to three weeks in January 1981, for a few weeks in February 1982, for a few weeks in January 2004, and for approximately one month beginning in March 1984. [REDACTED] also states that the applicant traveled to Mexico in November 1982, in September

1985, and in August 1987. He further indicates that the applicant worked for [REDACTED] and [REDACTED] as a mason from 1979 until 1985, and subsequently worked for "Fat Bobs Cement Pumping" in February 1985. While [REDACTED] claimed to have detailed knowledge of the applicant and his spouse, down to the applicant's weekly wages, his wife's address in Mexico, and the birthdates of his children born in Mexico, he provided no indication as to how he came to have this detailed knowledge and the affidavit was not accompanied by any proof of his relationship with the applicant.

It is noted that after presenting the affidavit from [REDACTED] the applicant changed his testimony to state that his wife was in the United States one time before 1980 and on one other occasion.

The director denied the application on May 5, 2006. In denying the application, the director concluded that the evidence submitted at the time of the applicant's interview and evidence already included in the record was insufficient to establish the applicant's eligibility for temporary residence under Section 245A of the Act. The director found that the applicant had not met his burden of proof by a preponderance of the evidence that he resided in the United States for the requisite period.

On appeal, counsel asserts that the interview was held under inadequate and difficult circumstances "which led to faulty communication and misinterpretation of [the] Applicant's testimony." Counsel suggests that while the applicant felt he could conduct the interview in English, he was at times confused. Counsel acknowledges that the CIS officer had some questions and answers translated for the applicant, but states that the quality of the communication between the applicant and the interviewing officer was inadequate. Counsel requests that the applicant be re-interviewed with a professional interpreter present.

Upon review, counsel's arguments are not persuasive. As noted above, the record reflects that the applicant agreed to conduct his interview with a CIS officer in English. He was given an opportunity to reschedule the interview for a date and time on which his interpreter could be present, and he chose not to do so.

Furthermore, notwithstanding the testimony given by the applicant during his interview, the evidence the applicant has submitted to demonstrate that he resided in the United States for the requisite period is not relevant, probative, and credible. The applicant's evidence of residence in the United States for the duration of the requisite period consists primarily of his own assertions and the statements and affidavits noted above. The statements and affidavits lack credibility and probative value for the reasons noted. While the applicant has submitted some documentary evidence, specifically a few receipts for payments received during the 1982 to 1985 period and receipts for registered mail dated from 1986 to 1988, this evidence is not sufficient to establish the applicant's continuous residence in the United States, or his arrival to the United States prior to January 1, 1982.

In this case, the absence of credible and probative documentation to corroborate the applicant's claim of continuous residence for the duration of the requisite period, as well as the inconsistencies and contradictions noted in the record, seriously detract 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 inconsistencies in the record and the lack of credible supporting documentation, it is concluded that he 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.