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U.S. Citizenship
and Immigration
Services

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FILE:

XAH 87 017 8034

Office: CALIFORNIA SERVICE CENTER

Date: **MAY 06 2008**

IN RE:

Applicant:



APPLICATION: Application for Temporary Resident Status under 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. All documents have 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 Director, California Service Center, initially denied the application for temporary resident status in a decision dated June 17, 1988. A timely appeal was filed with the Legalization Appeals Unit (LAU) (now the Administrative Appeals Office (AAO)) where the matter was reviewed and remanded on January 31, 1992 to the California Service Center for further consideration. The director of the California Service Center subsequently issued another decision on September 14, 2004 denying the application. The applicant's appeal remained in effect for the new decision, and the AAO dismissed the appeal on June 20, 2007. The AAO has *sua sponte* reopened the case.¹ Upon reconsideration, the decisions of the California Service Center denying the application and of the AAO dismissing the appeal will be withdrawn. The appeal will be sustained.

The applicant submitted a Form I-687, Application for Status as a Temporary Resident, under Section 245A of the Immigration and Nationality Act (Act), 8 U.S.C. § 1255a, on August 27, 1987. The director initially denied the application on June 17, 1988 because the applicant had been convicted of five misdemeanors. In response to the initial denial, the applicant filed an appeal on June 29, 1988 requesting a copy of his legalization file and claiming that he was wrongly denied on the ground that he had been convicted of five misdemeanors. However, the request for a copy of his file was made by an attorney whose Form G-28, Notice of Entry of Appearance of Attorney or Representative, was not properly executed, as it was not signed by the applicant. Counsel was notified by the California Service Center that, without the client's signature on the Form G-28, the Immigration and Naturalization Service (or Service, now Citizenship and Immigration Services, or CIS) could not comply with that request. It does not appear that the applicant was sent any such notice, and it is not clear that counsel received it.²

The applicant submitted court dispositions that indicated that three of his misdemeanor convictions had been vacated or dismissed in 1988. The appeal, including the relevant court dispositions, was forwarded to the LAU on August 24, 1989. Upon review, the LAU found that the applicant had submitted proof that three of the five misdemeanor convictions in his record, all for failure to appear in violation of section 40508(a) of the California Vehicle Code, had been either expunged or dismissed. As a result, the LAU found that the applicant's criminal record did not support a finding of ineligibility because the applicant had only two misdemeanor convictions. The LAU further held that the documents submitted by the applicant should be assessed for their authenticity and credibility to determine if the applicant had established continuous unlawful residence in the United States since his claimed entry on June 22, 1981. The case was remanded for the California Service Center to provide a new decision based on the merits of the case.

Although the case was remanded on January 31, 1992, a new decision was not issued by the director until September 14, 2004, when the application was again denied based on the applicant's ineligibility for temporary resident status for having been convicted of the five misdemeanors noted above. In the interim,

¹ Motions to reopen or reconsider a decision on an application for temporary residence are not permitted. 8 C.F.R. § 245a.2(q). The AAO may, however, *sua sponte* reopen any proceeding conducted by the AAO under 8 C.F.R. § 245a and reconsider any decision rendered in such proceeding. 8 C.F.R. § 103.5(b).

² The notification letter from the Service was sent to the applicant's counsel at an incomplete address, and was not sent to the applicant. Counsel provided her address as "[REDACTED] (Basement)." The address used by the Service included neither the name of the East Los Angeles Immigration Project nor an indication that it was a basement address.

the applicant was incorrectly denied work authorization. No assessment was made of the evidence of the applicant's residence in the United States for the statutory period. The prior appeal remained in effect, and the AAO issued a new decision on June 20, 2007. The AAO dismissed the appeal, finding that the director was correct in denying the application because of the prior five misdemeanor convictions. The AAO now finds that these decisions erroneously failed to take into account the LAU's prior determination that the applicant was not ineligible on the basis of his prior criminal record.

Prior decision on eligibility

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 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).

Section 40508(a) of the California Vehicle Code (VC) provides that "[a]ny person willfully violating his or her written promise to appear in court . . . is guilty of a misdemeanor regardless of the disposition of the charge upon which he or she was originally arrested."

In the present matter, a 1987 report from the California Department of Motor Vehicles in the record shows that the applicant was convicted of the following misdemeanor offenses at the time the initial denial was issued on June 17, 1988:

1. On February 10, 1987, the applicant was convicted of failure to appear in violation of section 40508(a) VC, docket # [REDACTED] (vacated August 5, 1988).
2. On February 11, 1987, the applicant was convicted of failure to appear in violation of section 40508(a) VC, docket # [REDACTED] (vacated October 11, 1988).
3. On February 13, 1987, the applicant was convicted of failure to appear in violation of section 40508(a) VC, docket # [REDACTED]
4. On July 27, 1987, the applicant was convicted of two separate counts of failure to appear in violation of section 40508(a) VC, docket # [REDACTED] (dismissed October 11, 1988) and # [REDACTED]

Court records from 1988 show that three of the convictions were dismissed or vacated (as noted above in parentheses). The LAU reviewed this evidence on appeal and, based on the law in effect at that time,

correctly held in its 1992 decision that the applicant's convictions did not render him ineligible.³ However, on remand and again on appeal to the AAO in 2007, both the California Service Center in 2004 and the AAO in 2007 agreed that, under current law, the vacated convictions remained convictions for immigration purposes. Those decisions found that, although the change in the Act and relevant precedent decisions were finalized after the applicant applied for temporary residence, it is a long-standing principle that issues of present admissibility are determined under the law that exists on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992). Pursuant to 8 C.F.R. § 103.3(c), precedent decisions are binding on all CIS offices.

Although those decisions correctly cited to current law, upon reconsideration, the AAO finds that the LAU's 1992 decision on appeal, finding that the applicant's convictions were not grounds to deny his application, should have been given effect at that time. Failure to do so has unduly prejudiced the applicant. Given the particular circumstances in this case, the AAO has chosen to recognize the validity of the LAU's 1992 decision and sustain the appeal, reiterating the LAU's determination that the applicant is not ineligible on the basis of his prior criminal record. Also, the AAO finds it appropriate to make a *de novo* decision on the applicant's eligibility based on a consideration of the evidence of residence for the requisite period.⁴

Evaluation of the evidence

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).

³ The Act, from the time it was passed until 1996, did not specifically define the term "conviction." The current definition of a conviction, found at section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), was added to the Act with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996). Paragraph (48) was added by Sec. 332(a)(1) of IIRAIRA. The Board of Immigration Appeals (BIA) interpreted the current definition to include convictions that have been expunged for reasons that do not go to the legal propriety of the original judgment. *See Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). When the decision in this case was issued by the LAU in 1992 remanding the matter to the California Service Center, however, current law at that time provided that convictions (non drug-related) that had been expunged were not considered convictions for immigration purposes. *See Matter of Luviano*, 21 I&N Dec. 235 (BIA 1996) (later overturned by *Matter of Luviano*, 23 I&N Dec. 718 (A.G. 2005)); *Matter of Ibarra-Obando*, 12 I&N Dec. 576 (BIA 1966; A.G. 1967); *Matter of G-*, 9 I&N Dec. 159 (BIA 1960; A.G. 1961).

⁴ 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 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). To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from the applicant's own testimony. 8 C.F.R. § 245a.2(d)(6).

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 affidavits indicating specific personal knowledge of the applicant's whereabouts during the time period in question rather than fill-in-the-blank affidavits that provide generic information.

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.

The issue now before the AAO is whether the applicant has furnished sufficient credible evidence to demonstrate by a preponderance of the evidence that he entered before 1982 and resided in the United States for the requisite period, which, as noted above, is from prior to January 1, 1982 through the date that he filed his I-687 Application, August 27, 1987. In this case, the applicant has met his burden.

On his I-687 Application, the applicant states that he entered the United States in June 1981 from Mexico and that he resided from June 1982 to June 1987 at [REDACTED] in Los Angeles and then moved to his current address at [REDACTED] in Maywood, California; that he has been associated with "La Voz Del Pueblo" in Los Angeles since December 1981, and that he has been self-employed at [REDACTED] at his Maywood address since August 1981. The 1987 report from the California

Department of Motor Vehicles and related court records, noted above, show that the applicant was issued a California driver license on July 24, 1984 and that he was present in California on various dates through 1988, residing at the addresses he listed on his I-687 Application. The applicant also submitted his son's birth certificate showing that his son was born in Los Angeles on October 6, 1986. He also submitted a receipt from the California Department of Food and Agriculture, dated August 19, 1987 in Los Angeles, for a "New Cash Buyer License" and a Business License Certificate for "Wercleyn Produce" at the applicant's Maywood address, showing that he was licensed as a Produce Peddler until June 30, 1988 (no issue date was shown). All of this evidence is probative of the applicant's residence in the United States during the requisite period, particularly from mid-July 1984.

He also submitted the following evidence in support of his claim:

- Affidavits from two produce sellers in California, (dated August 17, 1987), and (dated May 13, 1987). Both affiants provide their address and/or telephone number and state that they are acquainted with the applicant because they are in the produce business. Mr. states that the applicant has resided in Los Angeles since August 1981, that they became friends and have been doing business together since 1981, and that he sees him every day. Mr. states that the applicant resides at in Los Angeles, that he has known the applicant since October 1985 when the applicant became his customer, and that the applicant is regularly purchases produce from him. These affidavits are consistent with the applicant's claim to have been self-employed in a produce business since 1981 in Los Angeles and they credibly describe the basis of the relationship and continuous contact between the affiants and the applicant.
- A letter from (President), dated May 18, 1987, on letterhead of Guerrero Mexican Food Products in Los Angeles. Ms. states that the applicant has been one of their distributors since 1981 and adds that she can be contacted for additional information. Although the letter is not notarized and is not accompanied by any identification that would confirm's identification, it adds weight to the applicant's claim because the information was amenable to verification and is consistent with the applicant's claim and the affidavits from other produce sellers.
- Two "Affidavit of Witness" forms, from , dated August 12, 1987, and dated August 15, 1987. Both affiants provide their addresses in California; Mr. states that he has been the applicant's client since December 1981 to the present "because buys] produce from him"; and confirms that "the applicant has been selling produce in [his neighborhood in Fontana] since December 1981." These affidavits explain the basis of the continuing relationship with the applicant, are consistent with the prior affidavits and statements and add weight to the applicant's claim.
- A form "Affidavit of Witness" from s, dated August 24, 1987. Mr. gives his address as n Maywood, California, and states that he and the applicant have lived together at that address since 1986 and at two prior addresses from 1981 to the present. The prior addresses, both in Los Angeles, are 1, from 1982 to 1986; and

Street from October 1981 to 1982. This information is generally consistent with the applicant's I-687 Application, although the applicant failed to include his address before 1982 and he indicated that he moved to [REDACTED] in 1987 rather than 1986. The affidavit has some weight as evidence of the applicant's residence in the United States during the requisite period.

- A letter from "La Voz del Pueblo," dated May 5, 1987 on the agency's letterhead, and signed by [REDACTED]. Mr. [REDACTED] identifies himself as "Pastor of the Christian Center 'La Voz del Pueblo.'" On the letterhead stationery, he is listed as Founder/Director. He states that he has personally known the applicant "as an honest and dedicated person . . . who has been a member of this Congregation since December 1981," and offers to furnish any additional information requested. The letter does not conform to all regulatory standards, as it fails to provide the applicant's address when he was a member or establish the origin of the information being attested to. See 8 C.F.R. §§ 245a.2(d)(3)(v). However, the Pastor is identified on the agency's letterhead, the information was amenable to verification, and the information is consistent with the applicant's claimed affiliation with La Voz del Pueblo as stated on his I-687 Application. The letter is therefore credible and has some weight as evidence of the applicant's residence in the United States during the requisite period.

Other documents submitted in support of the applicant's claim add little probative value. These include (1) copies of Form 1040, U.S. Individual Income Tax Return, for 1981 to 1985; these forms, however, appear to be drafts and not final copies, and some years are not signed or dated; the 1981 form was prepared in 1987; (2) an affidavit, dated August 14, 1987, from a "client," Vicente Lopez, confirming that the applicant has lived continuously in the United States since 1981, but offering no additional details; and (3) various receipts for purchases, including for produce, during the requisite period; they do not clearly indicate the date of purchase or fail to include the applicant's address. Although these documents are consistent with the applicant's claim and other evidence in the record, they have only minimal value as evidence of the applicant's residence in the United States during the requisite period.

All of the other letters and affidavits, described above, are non-contradictory, sufficiently detailed, and include contact telephone numbers and/or contact addresses. With minor discrepancies, they are internally consistent, consistent with each other, and consistent with the applicant's statements. Contemporaneous documents contained in the record, including the applicant's driving record, his child's birth certificate, and his Business License Certificate as a Produce Peddler have clear probative value and add significant weight to the applicant's claim. The documentation submitted appears credible.

There is no indication from the record that the applicant's supporting documents are inconsistent with the claims made on his present application; that any inconsistencies exist *within* the claims made on the supporting documents; or that the documents contain false information. As stated in *Matter of E-M-*, 20 I&N Dec. at 80, when something is to be established by a preponderance of the evidence, the proof submitted by the applicant has to establish only that the asserted claim is probably true. That decision also states that, under the preponderance of evidence standard, an application may be granted even though some doubt remains regarding the evidence. *Id.* at 79. In this case, the documentation may be accorded substantial evidentiary weight and is sufficient to meet the applicant's burden of proof of residence in the United States for the requisite period.

Conclusion

The California Service Center initially found the applicant ineligible for temporary resident status on the basis of five misdemeanor convictions. The applicant appealed the decision and submitted proof that three of those convictions had been vacated or dismissed. When the Service Center forwarded the record to the LAU on appeal, the LAU held that the record did not support a finding of ineligibility due to the applicant's criminal record because he had only two misdemeanor convictions on his record. The LAU remanded the case in 1992 for the Service Center to consider the remaining evidence of eligibility for legalization, the applicant's evidence of residence for the requisite period. Instead of making a new determination based on the evidence of record, the director did not adjudicate the application until 2004. Based on new law, the director again determined that the applicant was no longer eligible for legalization because of his convictions, failing to give effect to the LAU's decision and order on remand. For these reasons, and on account of the 12-year delay in adjudication and the prior failure to give due consideration to the applicant's claim, the AAO has reopened the case to consider the merits of the claim at this time.⁵

In light of the circumstances in this case, the AAO finds it appropriate to give effect to the LAU's 1992 decision. The AAO sustains the applicant's appeal, filed on June 29, 1988, when he correctly claimed that he was not ineligible on the basis of his convictions. After a *de novo* consideration, the AAO also finds that the documents the applicant furnished in support of his application are credible, may be accorded substantial evidentiary weight and are sufficient to meet the applicant's burden of proof of residence in the United States for the requisite period. *The applicant has established by a preponderance of the evidence that he entered the United States before January 1, 1982 and maintained continuous, unlawful residence for the requisite period.* The AAO therefore remands the matter for approval of the applicant's I-687 Application for temporary resident status under section 245A(a) of the Act, contingent upon required criminal and background checks. Upon timely application for adjustment from temporary to permanent residence under section 245A(b) of the Act, similar consideration and action should be taken.

ORDER: The AAO withdraws its decision of June 20, 2007 and the California Service Center decision of September 14, 2004. The appeal is sustained. The case is returned to the California

⁵ Although not specific to applicants for benefits under section 245A of the Act, there is precedent supporting a decision to return individuals to the position in which they would have been, but for an error in their immigration proceeding, when changes in the law made unavailable the relief initially sought. *See e.g. Castillo-Perez v. INS*, 212 F.3d 518, 528 (9th Cir. 2000); *Batanic v. INS*, 12 F.3d 662, 667 (7th Cir. 1993). In *Castillo*, the applicant established that his failure to file for suspension of deportation was the result of ineffective assistance of counsel. *Castillo-Perez*, 212 F.3d at 527. The Ninth Circuit found that, in light of that ineffective assistance of counsel effectively denying the applicant of the right to be heard on the merits of his suspension application, and in view of circumstances and changes in the law that made him no longer eligible to apply for suspension of deportation, the only effective remedy was to remand with instructions to apply the law as it existed at the time of Castillo's hearing before the Immigration Judge. *Castillo-Perez*, 212 F.3d at 528. In *Batanic*, the Seventh Circuit remanded an asylum application to the BIA with instructions that an applicant be allowed to file for asylum as of the date of his immigration court hearing when agency error denied him the assistance of counsel. *Batanic*, 12 F.3d at 663-64, 668.



Service Center for action in compliance with this decision, including the adjudication of any future application for adjustment of status to lawful permanent resident under the Act. If the decision is adverse to the applicant, it shall be certified to the AAO for review.