U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: LOS ANGELES Date: OCT 31 2008

WAC-99-092-50683

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 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 was denied by the District Director, Los Angeles on December 19, 2005. 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) on February 8, 1988 and the application was denied on March 31, 1989. On July 15, 1989, the application was re-opened *sua sponte* without appeal. The director determined that the applicant was not admissible and ineligible for temporary resident status pursuant to 245A of the INA because he was convicted of three misdemeanors in the United States. The director denied the application, finding that the applicant was, therefore, not eligible to adjust to temporary resident status.

On appeal, the applicant asserts that one of his misdemeanor convictions has been reduced to an infraction. Specifically, the applicant submits court documents from the Municipal Court of California, City of Los Angeles, which indicate that the applicant's May 7, 1998 conviction under California Vehicular Code section 12500(A) has been deemed amended to an infraction pursuant to Section 17(B)(4) of the California Penal Code. The applicant further asserts that since one of his misdemeanor convictions has been reduced to an infraction, he is eligible for the benefit sought.

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).

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.

The applicant has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status. The inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. 8 C.F.R. § 245a.2(d)(5).

An alien who has been convicted of a felony or of three or more misdemeanors committed in the United States is ineligible for Temporary Resident status. *See* 8 C.F.R. § 245a.2(c)(1).

As defined in 8 C.F.R. § 245a.1(o):

> *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).[1] 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.

In this case, a review of the record reveals that the applicant's May 7, 1998 conviction under California Vehicular Code section 12500(A) has been reduced from a misdemeanor to an infraction pursuant to Section 17(B)(4) of the California Penal Code. The court documents indicate that the motion to reduce the misdemeanor to an infraction was brought by the state and is not the result of a state rehabilitative statute. Rather, the misdemeanor is reduced pursuant to Section 17(B)(4) of the California Penal Code which states: "A violation of any code section listed in Section 19.8 is an infraction subject to the procedures described in Sections 19.6 and 19.7 when:

> (1) The prosecutor files a complaint charging the offense as an infraction unless the defendant, at the time he or she is arraigned, after being informed of his or her rights, elects to have the case proceed as a misdemeanor, or;

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[1] The regulation at 8 C.F.R. § 245a.1(p) defines "felony" generally as a crime punishable by imprisonment for more than one year, but makes an exception if such an offense is defined by the State as a misdemeanor and the sentence actually imposed is one year or less.

> (2) The court, with the consent of the defendant, determines that the offense is an infraction in which event the case shall proceed as if the defendant had been arraigned on an infraction complaint.

The applicant was convicted on May 7, 1998 for driving without a license under Section 12500(A) of the Vehicular Code. (Case No. [redacted]) This section is listed in Section 19.8 as an infraction. Thus, the misdemeanor conviction has been reduced by the Municipal Court of California, County of Los Angeles, based upon the merits of the original case. Applicant is therefore correct that this conviction will not be deemed a misdemeanor for immigration purposes.

Thus, for the purposes of this application, the applicant stands convicted of two misdemeanors. First, on August 15, 1997, the applicant was arrested and later convicted in the Municipal Court of Compton Courthouse Judicial District, of the offence of Battery Against Former Spouse or Fiance in violation of California Penal Code Section 243(E)(1). (Case No[redacted]. Second, the applicant was convicted on August 27, 2003 of Driving While Intoxicated in violation of California Vehicular Code 23152(B). (Case No. [redacted]. Thus, the applicant's assertion on appeal that he is not inadmissible because one of his three convictions has been reduced to an infraction is sustained by AAO.

However, the AAO has conducted a *de novo*[2] review of the application and found that the applicant is not eligible for the benefit sought based upon other grounds. Specifically, on his Form I-687 application for temporary resident status, the applicant admitted that he was absent from the United States from January 1982 until March 1982. The applicant also signed a sworn statement indicating that he was absent from the United States from January 20, 1982 until March 17, 1982. This absence of 57 days represents a break in the applicant's continuous residency.

The applicant shall be regarded as having resided continuously in the United States if at the time the application for temporary resident status is considered filed, no single absence from the United States has exceeded 45 days, and the aggregate of all absences has not exceeded 180 days during the requisite period unless the applicant can establish that due to emergent reasons the return to the United States could not be accomplished within the time period allowed, the

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[2] The director's error is harmless because the AAO conducts a de novo review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility as required by the regulation at 8 C.F.R. § 245a.2(d)(6). 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).

applicant was maintaining a residence in the United States, and the departure was not based on an order of deportation. 8 C.F.R. § 245a.2(h).

If the applicant's absence exceeded the 45-day period allowed for a single absence, it must be determined if the untimely return of the applicant to the United States was due to an "emergent reason." Although this term is not defined in the regulations, *Matter of C-*, 19 I&N Dec. 808 (Comm. 1988), holds that "emergent" means "coming unexpectedly into being."

In this case, the applicant has not indicated that his return to the United States was delayed due to an emergent reason. Thus, the applicant has not continuously resided in the United States for the duration of the relevant period and is therefore ineligible for the benefit sought.

The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act based upon the factors noted above.

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