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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: LOS ANGELES Date: JUN 0 8 2009

MSC 04 269 10016

IN RE: Applicant: [redacted]

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. If your appeal was dismissed or rejected, all documents have been returned to the National Benefits Center. 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. If your appeal was sustained or remanded for further action, you will be contacted.

for John F. Grissom
Acting 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) on 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) on February 17, 2004 (CSS/Newman Settlement Agreements), was denied by the director in Los Angeles, California. It is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The director denied the application on the ground that the applicant failed to establish that he was continuously resident 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 for legalization that ended on May 4, 1988.

On appeal the applicant asserts that he has submitted sufficient documentation of his continuous residence in the United States during the years 1981-1988. The applicant resubmits copies of documentation already in the record.

An applicant for temporary resident status under section 245A of the Immigration and Nationality Act (the Act) must establish his or her entry into the United States before January 1, 1982, and continuous residence in the United States in an unlawful status from before January 1, 1982 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 his or her continuous physical presence 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 the regulation at 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 from May 5, 1987 to May 4, 1988. *See* CSS Settlement Agreement, paragraph 11 at page 6; Newman Settlement Agreement, paragraph 11 at page 10.

An alien who has been convicted of a felony or of three or more misdemeanors committed in the United States is ineligible for adjustment to lawful temporary resident status. *See* section 245A(a)(4)(B) of the Act and 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) [which 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]. 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.

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. *See* 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 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 (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.

The regulations provide an illustrative list of documents – which includes affidavits and "any other relevant document" – that the applicant may submit as evidence of continuous residence in the United States during the requisite period under section 245A of the Act. *See* 8 C.F.R. § 245a.2(d)(3)(vi)(L).

The applicant, a native of Mexico who claims to have lived 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, on June 25, 2004.

On March 22, 2006, the director issued a Notice of Intent to Deny (NOID), citing the statutory and regulatory provisions making aliens convicted of one felony or three or more misdemeanors ineligible for temporary resident status, and advising the applicant to submit certified court documents showing the final disposition of every arrest in the United States.

The applicant responded by submitting documentation from the Santa Ana Police Department confirming that he was charged on December 8, 1991 with two violations of the California Vehicle Code, both of which were misdemeanors. The police reports did not indicate how the charges were resolved, and the applicant did not submit a final court disposition for either charge.

On November 29, 2006, the director issued a Request for Evidence (RFE) in which the applicant was requested to submit evidence of his residence in the United States during the years 1981-83 and 1987, as well as original or certified court dispositions for any and all arrests in the United States.

The applicant responded by submitting a series of photocopied documents, assertedly dating from the years 1981, 1982, 1983, and 1987, as evidence of his residence in the United States during those years. The applicant also resubmitted a document from the Santa Ana Police Department that was already in the record, as well as a computer printout from the California Department of Motor Vehicles confirming that the applicant was charged on December 8, 1991 with two violations of the California Vehicle Code, both misdemeanors, was convicted of one or both on January 10, 1992, and was sentenced to three years probation. Once again, the applicant did not submit any final court dispositions with regard to his arrests.

On May 18, 2007, the director issued a Notice of Decision denying the application. The director did not address the issue of the applicant's criminal record and failure to submit the final court dispositions of his arrests. Instead, he analyzed the documents submitted as evidence of the applicant's residence in the United States during the years 1981-83 and 1987, found that some of them conflicted with information the applicant had provided on his Form I-687, and determined that all of the documents were substantively deficient in that they lacked vital pieces of information that detracted from their credibility. The director concluded that the documentation submitted in response to the NOID failed to establish that the applicant had resided continuously in the United States during all of the years required for adjustment to temporary resident status under section 245A of the Act.

On appeal the applicant reiterates his claim to have resided continuously in the United States since 1981, and resubmits copies of some documents already in the record.

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 probative evidence to demonstrate that he resided continuously in the United States in an unlawful status from

before January 1, 1982 through the date of attempted filing during the original one-year filing period for legalization that ended on May 4, 1988. The AAO determines that he has not.

While there is evidence in the record that the applicant resided in the United States for some of the requisite time period, the AAO agrees with the director that the documentation with regard to other years, particularly 1981 to 1983, is not persuasive. The photocopied document ostensibly addressed to the applicant and postmarked June 12, 1981 bears no evidence of a stamp and cannot be verified as an authentic envelope. The registered mail receipt addressed to the applicant bears a postmark which the applicant asserts is from 1981, but is too faint and illegible to be credible. Both of these documents, moreover, identify the applicant's address as [redacted] in Compton, California, which conflicts with the address – [redacted] in Compton – which the applicant identified on his Form I-687 in 2004 (as well as on an earlier Form I-687 he filed in 1993) as his residence from 1981 to 1989. The applicant's explanation for this discrepancy – that he used a different address on these documents because mail was often lost at his real address – is not convincing

As for the two documents dated in 1982 – the certificate awarded to the applicant for completion of an E.S.L. program dated June 15, 1982, and the receipt from St. George Medical Groups for money received from the applicant – neither identifies any address for the applicant in the United States. Moreover, the E.S.L. certificate does not even identify the organization that conducted the program. Likewise, neither of the two documents dated in 1983 – the "Employee Status Change Report" dated March 22, 1983 and the Spanish-language document of the Instituto Norteamericano dated July 21, 1983, which records a money transaction of $32.00 – identifies any address for the applicant in the United States. In addition, the Employee Change Status Report, though identifying the applicant as the employee, does not identify the employer.

For all of the reasons discussed above, the documentation submitted by the applicant bearing dates in 1981, 1982, and 1983 has little or no evidentiary weight. The documents lack sufficient credibility to establish the applicant's continuous residence in the United States during those years.

The only other evidence in the record of the applicant's residence in the United States during the years 1981-1983 is a notarized statement of "employment verification" signed by [redacted] on March 2, 1993, in which she stated that she employed the applicant as a cook at [redacted] in Santa Ana, California, from December 10, 1981 to September 23, 1987. (On his Form I-687 the applicant identified his employer at this time as a Mexican restaurant.)

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 letter from [redacted] does not meet these criteria because it did not provide the applicant's address at the time of employment, did not declare whether the information came from company records, and did not indicate whether such records are available for review. Nor did [redacted] or the applicant submit any documentation of the applicant's employment, such as pay stubs or tax statements. For the reasons discussed above, the AAO concludes that the notarized statement from [redacted] has minimal probative value. It is not persuasive evidence of the applicant's continuous residence in the United States during that entire time period of alleged employment at the Mexican restaurant.

Based on the foregoing analysis of the evidence, the AAO concludes that the applicant has not established his continuous unlawful residence in the United States during the years 1981-1983. Therefore, the applicant has not established that he resided continuously 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 for legalization that ended on May 4, 1988. Accordingly, the applicant is ineligible for temporary resident status under section 245A(a)(2) of the Act.

Furthermore, the applicant has not submitted the final court disposition of his two misdemeanor charges in California, despite two requests (the NOID and the RFE) from U.S. Citizenship and Immigrations Services. The AAO notes that failure to comply with a request for evidence is a ground for dismissal by itself. *See* 8 C.F.R. § 103.2(b)(13)(i). Though two misdemeanor convictions would not make the applicant ineligible for temporary resident status under section 245A of the Act, they would have to be taken into consideration, as would any unresolved criminal charges, in future proceedings.

The appeal will be dismissed, and the application denied.

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