

identifying data deleted to
prevent identity unwarranted
invasion of personal privacy

PUBLIC COPY



U.S. Citizenship
and Immigration
Services

41

[REDACTED]

FILE:

[REDACTED]

Office: ATLANTA

Date: NOV 04 2009

MSC 06 098 13999

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:

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 if your case was remanded for further action, you will be contacted.

Perry Rhew
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 director, Atlanta. 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 (together comprising the I-687 Application). The director denied the application for temporary residence because the applicant had not met his burden of proof to establish by a preponderance of credible, probative evidence that he resided in the United States for the requisite period, is admissible and otherwise eligible for adjustment of status. The director concluded that the applicant was not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements.

The applicant represents himself on appeal. He states on the Notice of Appeal (Form I-694) that his application for temporary residence (Form I-687) was denied because he has three misdemeanor convictions. The applicant avers that his convictions have been dismissed, and that he is otherwise eligible for adjustment to temporary resident status. Attached to the Notice of Appeal is a photocopy of letter from the Clerk's Office for the State Court of Cobb County, Georgia, dated November 22, 2006. The letter refers to [REDACTED], and states that any records pertaining to the cited case have been destroyed in accordance with the state records retention schedule. Also submitted in support of the appeal is a photocopy of a letter from the Magistrate Court of Cobb County, dated November 29, 2006. This document refers to [REDACTED] and indicates that the county solicitor "has elected not to prosecute against the above named defendant," and that "all charges have been dismissed."

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). 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, "[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 or petition.

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.* at 591.

Additionally, 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 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).

The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where - (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Section 101(a)(48)(A) of the Immigration and Naturalization Act (Act), 8 U.S.C. § 1101(a)(48)(A).

The AAO has reviewed all of the documents in the file in their entirety and we conclude that the applicant has not met his burden of proof to establish eligibility for temporary resident status for a number of reasons. First, the AAO observes that the director does not mention a criminal record in either the Notice of Intent to Deny (NOID) issued on March 29, 2006, or the letter of denial issued on October 2, 2007. Thus, the AAO will first examine the evidence of entry, physical presence, and residence submitted by the applicant in support of his application for temporary residence.

The applicant has also submitted affidavits from [REDACTED] and [REDACTED]. All affiants attest to the applicant presence in the United States during part, or all, of the qualifying period. These affidavits fail, however, to establish the applicant's continuous unlawful residence in the United States for the duration of the requisite period. As stated previously, the evidence must be evaluated not by the quantity of evidence alone but by its quality; an applicant must provide evidence of eligibility apart from his or her own testimony; and the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility.

None of the witness statements provide concrete information, specific to the applicant and generated by the asserted associations with him, which would reflect and corroborate the extent of those associations and demonstrate that they were a sufficient basis for reliable knowledge about the applicant's residence during the time addressed in the affidavits. To be considered probative and credible, witness affidavits must do more than simply state that an affiant knows

an applicant and that the applicant has lived in the United States for a specific time period. Their content must include sufficient detail from a claimed relationship to indicate that the relationship probably did exist and that the witness does, by virtue of that relationship, have knowledge of the facts alleged. Upon review, the AAO finds that, individually and together, the witness statements do not indicate that their assertions are probably true. Therefore, they have little probative value.

Next, the applicant has submitted federal income tax returns for 2003 – 2005, a bank statement and a utility bill for 2006, motor vehicle titles for 2000 and 2004, loan documents for 2002 and 2006, a 1990 employment authorization card, and two letters from employers for 1984 and 2006. Although the 1984 employment document is relevant, the remaining documents are outside of the qualifying period and therefore have no probative value. None of the documents viewed cumulatively or individually, establish that the applicant entered the United States on or before January, 1982 and remained here unlawfully for the entire qualifying period. Having failed to meet his burden of proof with probative, independently verifiable evidence, the applicant's request for temporary resident status must be denied on those grounds.

We will now examine the evidence regarding criminal convictions. The applicant states on the Form I-694 that he has three misdemeanor convictions. The evidence submitted by the applicant on appeal identifies two [REDACTED] and [REDACTED] but does not identify the underlying criminal charges, except to note that the applicant was not prosecuted for [REDACTED]. The significance of the case docketed at: [REDACTED] remains unclear in the record, and the applicant does not resolve this ambiguity on appeal. Thus, we consider this evidence of a criminal arrest with no final court disposition.

However, the record contains evidence of two convictions in 2005. A printout from the Smyrna Municipal Court indicated that the applicant pleaded guilty on June 6, 2005 to two separate misdemeanor offenses, DUI (Official Code of Georgia section 40-6-391) and Failure to Maintain Lane (Official Code of Georgia section 40-6-48). The court ordered that the applicant forfeit a cash bond. The AAO has reviewed the motor vehicle code of Georgia. A violation of section 40-6-48 of the motor vehicle code does not identify a specific *range of punishment and thus does not specify either a misdemeanor or felony offense*. In order to determine whether a violation of this section of the motor vehicle code qualifies as a misdemeanor offense as that term is federally defined, the AAO has reviewed the general provisions of crimes and offenses, found at Title 16 of the Official Code of Georgia. Section 16-1-10 states that any conduct that is made criminal by this title or by another statute of this state and for which punishment is not otherwise provided shall be punished as for a misdemeanor. Thus, we conclude that a conviction of both listed sections of the Official Code of Georgia meet the federal definition of misdemeanor offenses. 8 C.F.R. § 245a.1(o).

Additionally, the record indicates that the applicant was stopped on May 1, 2006 and June 22, 2006 by the Cobb County Police Department and charged on each occasion with driving with a suspended or revoked license, in violation of section 40-5-20 of the Official Code of Georgia.

[REDACTED] and [REDACTED] The applicant pleaded guilty to both offenses on August 22, 2006 and was ordered to pay two separate fines. The AAO has reviewed the statute under which the applicant was convicted and we note that the classification for this offense is found at section 40-5-121 of the Official Code of Georgia. A conviction under section 40-5-20 is considered a misdemeanor. Therefore, the record in this case indicates that the applicant has four misdemeanor convictions and is therefore ineligible for temporary resident status on criminal grounds. 8 C.F.R. § 245a.3(c)(1). No waiver of such ineligibility is available.

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