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

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: LOS ANGELES Date: OCT 05 2009

MSC 05 270 10518

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. 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, Los Angeles. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application for temporary residence (Form I-687) on March 8, 2007, because the applicant did not establish by a preponderance of credible, probative evidence that he entered the United States on or before January 1, 1982, and remained here in an unlawful status for the requisite period. Specifically, the director noted that the criminal history record, affidavits, and social security earning statements from 1989 were insufficient to establish eligibility for temporary resident status.

The applicant is represented by counsel on appeal. Counsel argues in a brief submitted in support of the appeal that the applicant has met his burden of establishing eligibility, in that he first entered the United States in 1979, that he has remained in the country continuously but for one brief three week absence in 1987, and that his three arrests in 1984, 1985, and 1992 did not result in any convictions.

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 evidence in the file in its entirety. We note initially that the applicant filed the Form I-687 on June 27, 2005, and was issued a Notice of Intent to Deny (NOID) on February 1, 2006, that directed the applicant to supply certified court documents regarding the final disposition for three arrests in Los Angeles in 1984 for *theft of personal property*, in 1985 for *burglary*, and in 1992 for *grand theft auto*.

In response, the applicant submitted a record certification from the Superior Court of California, Los Angeles, County, dated February 22, 2006 that claims the records referring to the applicant's 1984 arrest were destroyed. However, the FBI criminal record background documents confirm that the applicant was arrested on August 30, 1984 by the Los Angeles Police Department, and charged with and convicted on one count of violating section 484 of the California Penal Code – *theft*. The applicant was sentenced to 12 months probation and five days in jail. Additionally, the record before the AAO contains a printout from the California Department of Justice Bureau of Criminal Identification with a certified date stamp of October 27, 2004. This document also confirms the applicant's conviction for theft and the ultimate disposition by the court. Thus, the applicant's contention that his arrest in 1984 did not result in a conviction is contradicted by the evidence in the record.

The California Department of Justice Bureau of Criminal Identification document also identifies that the applicant was arrested on or about December 7, 1984 by the Los Angeles County Police Department and charged with one count of violating section 487.3 of the California Penal Code – *grand theft auto*. No documents explain the final disposition for this charge and our review of the statute in question indicates that under this particular section of the Penal Code, grand theft auto is charged as a felony.

Next, the California Department of Justice Bureau of Criminal Identification document identifies that the applicant was arrested on December 25, 1985 by the Los Angeles County Police Department and charged with one count of violating section 459 of the California Penal Code – *burglary*. The applicant was convicted for this offense on February 26, 1986, and sentenced to a term of 36 months probation. The court docket no. is identified as [redacted] **Burglary is** considered to be a felony offense.

Next, the AAO notes that the record contains a photocopy of a minute order issued by the Municipal Court of West Los Angeles County, Docket no. [redacted] This document reveals that the applicant was arrested and charged with one count of felony *burglary*, in violation of section 459 of the California Penal Code on November 21, 1986. However, the minute order explains that on June 28, 1991 the charge was dismissed and the proceedings were terminated because the police arrested the wrong defendant.

Thereafter, the FBI criminal record background documents identify that the applicant was arrested on or about November 4, 1986 by the Los Angeles Police Department and charged with one count of *grand theft auto*. The record contains no charging documents, police, or other court documents to reveal the docket no. of this case, or the ultimate disposition of the arrest. This arrest is also confirmed by the California Department of Justice Bureau of Criminal Identification document and identifies that the applicant was charged with one count of violating section 487.3 of the California Penal Code – *grand theft auto*.

Thereafter, the record contains an additional record certification from the Superior Court of California, Los Angeles, County, dated February 22, 2006 that claims the records referring to the applicant's 1992 arrest were destroyed. As regards this incident, the FBI documents identify that the applicant was arrested by the legacy INS on or about January 14, 1992, and placed in deportation proceedings. There is no ultimate disposition for this incident in the file. This incident is also confirmed on the California Department of Justice Bureau of Criminal Identification document.

Thus, the record indicates that the applicant has a significant criminal record, which includes a conviction in 1984 for theft, an arrest in 1984 for felony grand theft auto with no evidence of final disposition, a conviction in 1986 for felony burglary, an additional arrest in 1986 for burglary where the charges were dismissed on account of a police error, an arrest in 1986 for felony grand theft auto with no evidence of final disposition, and an arrest in 1992 by the legacy INS in order to commence deportation proceedings against the applicant.

Therefore, the applicant is not eligible for temporary resident status on criminal grounds due to his theft and burglary convictions, and because the other arrests remain unresolved and unexplained on appeal. *See* INA § 212(a)(2)(A)(i)(I) and (ii)(I); 8 U.S.C. § 1182(a)(2)(A)(i)(I) and (ii)(I); *See* 8 C.F.R. § 245a.2(c)(1).

Additionally, we note that the director denied the Form I-687 because the applicant failed to establish entry and continuous residence for the requisite period. The AAO has reviewed the evidence of entry and continuous residence submitted by the applicant. We agree with the director's analysis and conclusions regarding entry and residence. A letter dated October 25, 2006 from the IRS states that the applicant commenced filing tax returns in 1988. The affidavits submitted by the applicant from employers [redacted] and [redacted] refer to part of the qualifying period (1984 to 1993). The affidavits from [redacted] and [redacted]

[redacted] state that they have know the applicant since 1986 and 1985 respectively. Finally, the affidavit from [redacted] states that he has known the applicant since 1980. However, neither this affidavit nor any other affidavit noted above contains sufficient information to establish the applicant's entry and residence for the entire 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.

The statement from [redacted] does not 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 [redacted] statement does not indicate that the assertions are probably true. Therefore, it has little probative value and the application for temporary residence must be denied on this ground also. *See* 8 C.F.R. § 245a.2(d)(5) and *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989).

The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act because he cannot meet his burden of proof regarding entry and residence for the requisite period, as well as on account of his criminal convictions.

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