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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: JAN 15 2010

MSC-06-073-12794

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 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 of the Los Angeles office. 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 (LULAC) Class Membership Worksheet. The director denied the application, finding that the applicant was ineligible for adjustment to temporary resident status because he had not established by a preponderance of the evidence that he had continuously resided in the United States in an unlawful status for the duration of the requisite time period.

On appeal, the applicant asserts that the evidence which he previously submitted establishes by a preponderance of the evidence that he continuously resided in the United States in an unlawful status for the duration of the requisite period. The applicant has not submitted any additional evidence on appeal. The AAO has considered the applicant's assertions, reviewed all of the evidence, and has made a *de novo* decision based on the record and the AAO's assessment of the credibility, relevance and probative value of the evidence.[1]

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. The applicant must also establish that he or she has been continuously physically present in the United States since November 6, 1986. 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, and is

[1] 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 long been recognized by the federal courts. *See, e.g. Dor v. INS,* 891 F.2d 997, 1002 n.9 (2d Cir. 1989).

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. Doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. *Matter of Ho,* 19 I & N Dec. 582, 591-592 (BIA).

The issue in this proceeding is whether the applicant has established that he (1) entered the United States before January 1, 1982 and (2) has continuously resided in the United States in an unlawful status for the requisite period of time. The documentation that the applicant submits in support of his claim to have arrived in the United States before January 1982 and lived in an unlawful status during the requisite period consists of witness statements and documents. The AAO has reviewed each document in its entirety to determine the applicant's eligibility; however, the AAO will not quote each witness statement in this decision. Some of the evidence submitted indicates that the applicant resided in the United States after May 4, 1988; however, because evidence of residence after May 4, 1988 is not probative of residence during the requisite time period, it shall not be discussed.

The record contains witness statements from [redacted], and [redacted] The statements are general in nature and state that the

witnesses have knowledge of the applicant's residence in the United States for all, or a portion of, the requisite period.

Although the witnesses claim to have personal knowledge of the applicant's residence in the United States during the requisite period, the witness statements do 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 in the United States during the requisite period. To be considered probative and credible, witness statements must do more than simply state that a witness 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 it probably did exist and that the witness, by virtue of that relationship, does have knowledge of the facts alleged. For instance, the witnesses do not state how they date their initial meeting with the applicant or specify social gatherings, other special occasions or social events when they saw and communicated with the applicant during the requisite period. The witnesses also do not state how frequently they had contact with the applicant during the requisite period. The witnesses do not provide sufficient details that would lend credence to their claimed knowledge of the applicant's residence in the United States during the requisite period. For these reasons the AAO finds that the witness statements do not indicate that their assertions are probably true.

The record contains two employment verification letters from [redacted] of [redacted], of Mendota, California. In the first letter the witness states that the applicant worked for his company from May 1, 1985 to May 1, 1986, for a total of 105 days, performing agricultural work. In the second letter the witness states that the applicant worked for his company from April 1981 through December 1987, for an estimated 100 days each year, performing agricultural work. Due to these inconsistencies, the employment verification letters have minimal probative value.

Further, the employment verification letters from [redacted] do not meet the requirements set forth in the regulations, which provide specific guidance on the sufficiency of documentation when proving residence through evidence of past employment. The regulation at 8 C.F.R. § 245a.2(d)(3)(i) provides that letters from employers must include: (A) Alien's address at the time of employment; (B) Exact period of employment; (C) Periods of layoff; (D) Duties with the company; (E) Whether or not the information was taken from official company records; and (F) Where records are located and whether the Service may have access to the records. If the records are unavailable, an affidavit-form letter stating that the alien's employment records are unavailable and why such records are unavailable may be accepted in lieu of subsections (E) and (F). The affiant's statements of employment fail to comply with the above cited regulation because they lack considerable detail regarding the applicant's employment. For instance, the affiant does not state the number of hours or days the applicant was employed, or the location at which he was employed. Furthermore, the affiant does not state how he was able to date the applicant's employment. It is unclear whether he referred to his own recollection or any records he may have maintained. For

these additional reasons, the affiant's statements regarding the applicant's employment are of little probative value.

The record contains the birth certificate of the applicant's daughter, [redacted] born on June 5, 1985 in Los Angeles. This document is some evidence of the applicant's presence in the United States on June 5, 1985.[2]

The applicant has submitted copies of two undated photographs, which have been labeled as being of the applicant and his daughter. Copies of photographs do not establish the applicant's continuance residence in the United States for the duration of the requisite period.

The record contains a statement of earnings from the Social Security Administration reflecting earnings for the applicant in 1981, and earnings in 1984 through 1987. Although this statement is some evidence in support of the applicant's presence in the United States in 1981 and in 1984 through 1987, it does not establish the applicant's continuance residence in the United States for the duration of the requisite period. In addition, this statement is inconsistent with the testimony of the applicant in the instant I-687 application that he worked for [redacted] from April 1981 through December 1987, since the statement of earnings does not list [redacted] as an employer. Due to this inconsistency, this statement is of little probative value.

The remaining evidence in the record is comprised of copies of the applicant's statements, the instant I-687 application, the initial I-687 application filed in 2004 and a Form I-589, application for asylum filed in 2004. The AAO finds in its *de novo* review that the record of proceedings contains materially inconsistent statements from the applicant regarding his absences from the United States during the requisite statutory period.

At the time of his interview on the instant I-687 application the applicant stated that he first came to the United States in October 1980. In the instant I-687 application the applicant lists two absences from the United States, in 1984 and in 1987, respectively. The applicant lists residences in California from October 1980 for the duration of the requisite period, and employment in California from January 1981 for the duration of the requisite statutory period.

In the initial I-687 application, the applicant states that he last came to the United States on April 6, 1984, and lists one absence from the United States in 1987. The applicant lists residences in California from April 1984 for the duration of the requisite statutory period, and employment in California from May 1984 for the duration of the requisite statutory period.

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[2] The record also contains a birth certificate for a daughter named [redacted] born in Los Angeles on **December 12, 1990, and a birth certificate for a son,** [redacted], born on December 6, 1991. However, the witness statement of [redacted] encloses a photograph of the witness and "my brothers". In addition, in a statement dated March 19, 2004 the applicant states that he has two children. Further, in an I-589 application filed in *2004, the applicant lists only two children,* [redacted] *and* [redacted]. ***While outside of the requisite time period, these*** inconsistencies call into question the reliability of the remaining evidence offered in support of the applicant's continuous residence in the United States during the requisite period.

At the time of his interview on the I-589 application the applicant stated that he was 20 years old when he left Mexico. In the I-589 application, at part 18, the applicant states that he left Mexico on May 6, 1984, and lists his entry into the United States on May 6, 1984 as his only entry into the United States.

The applicant has failed to provide probative and credible evidence of his continuous residence in the United States for the duration of the requisite period. The inconsistencies regarding the dates of the applicant's first entry into the United States, as well as his residence and employment in and absences from the United States, are material to the applicant's claim in that they have a direct bearing on the applicant's residence in the United States during the requisite period. No evidence of record resolves these inconsistencies. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence pointing to where the truth lies. Doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. *Matter of Ho,* 19 I & N Dec. 582, 591-592 (BIA). These contradictions undermine the credibility of the applicant's claim of entry into the United States prior to January 1, 1982 and continuous residence in the United States during the requisite period.

Upon a *de novo* review of all of the evidence in the record, the AAO agrees with the director that the evidence submitted by the applicant has not established that he is eligible for the benefit sought. The various statements currently in the record which attempt to substantiate the applicant's residence in the United States during the statutory period are not objective, independent evidence such that they might overcome the inconsistencies in the record regarding the applicant's claim that he maintained continuous residence in the United States throughout the statutory period, and thus are not probative.

Beyond the decision of the director, the record reveals that on November 14, 1985, the applicant was charged with a violation of section 20001 of the California Vehicle Code (VC), *Hit and Run Resulting in Death or* Injury (Los Angeles Police Department, [redacted] At an interview on March 18, 2004, the applicant admitted to having pled guilty to the charge, and stated that he served 8 days in jail. The record also contains a "No Record" statement from the Superior Court of California, County of Los Angeles.[3] The applicant has failed to submit a final court disposition for the hit and run charge, or evidence identifying the offense for which he was convicted.

The applicant stated at the time of his March 18, 2004 interview that he does have a criminal conviction. However, the applicant stated on appeal that he has never been arrested or convicted of any crime. The applicant's statements are subject to verification by United States Citizenship and Immigration Services (USCIS). The applicant must agree to fully cooperate in the verification process. Failure to assist USCIS in verifying the information necessary for the

[3] The record reveals that on March 19, 2004 the applicant was determined to be not eligible to apply for asylum status. The applicant's asylum application was referred to the immigration court in Los Angeles. The applicant submitted the "No Record" statement at a hearing before the immigration judge on March 30, 2007.

adjudication of the application may result in a denial of the application. 8 C.F.R. § 245a.2(k)(5). The applicant failed to submit a final court disposition for the hit and run offense, or evidence identifying the offense for which he was convicted as a result of his November 14, 1985 arrest.

Section 20001 of the California Vehicle Code (VC) provides:

> (a) The driver of any vehicle involved in an accident resulting in injury to any person, other than himself or herself, or in the death of any person shall immediately stop the vehicle at the scene of the accident and shall fulfill the requirements of Sections 20003 and 20004.
>
> (b) (1) Except as provided in paragraph (2), any person who violates subdivision (a) shall be punished by imprisonment in the state prison, or in a county jail for not more than one year, or by a fine of not less than one thousand dollars ($1,000) nor more than ten thousand dollars ($10,000), or by both that imprisonment and fine.
>
> (2) If the accident described in subdivision (a) results in death or permanent, serious injury, any person who violates subdivision (a) shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than 90 days nor more than one year, or by a fine of not less than one thousand dollars ($1,000) nor more than ten thousand dollars ($10,000), or by both that imprisonment and fine. However, the court, in the interests of justice and for reasons stated in the record, may reduce or eliminate the minimum imprisonment required by this paragraph.
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> (3) In imposing the minimum fine required by this subdivision, the court shall take into consideration the defendant's ability to pay the fine and, in the interests of justice and for reasons stated in the record, may reduce the amount of that minimum fine to less than the amount otherwise required by this subdivision.
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> (c) A person who flees the scene of the crime after committing a violation of Section 191.5 of, paragraph (1) or (3) of subdivision (c) of Section 192 of, or subdivision (a) or (c) of Section 192.5 of, the Penal Code, upon conviction of any of those sections, in addition and consecutive to the punishment prescribed, shall be punished by an additional term of imprisonment of five years in the state prison. This additional term shall not be imposed unless the allegation is charged in the accusatory pleading and admitted by the defendant or found to be true by the trier of fact. The court shall not strike a finding that brings a person within the provisions of this subdivision or an allegation made pursuant to this subdivision.
>
> (d) As used in this section, "permanent, serious injury" means the loss or permanent impairment of function of any bodily member or organ.

This section of the California VC provides that an offense under this section can be charged as a misdemeanor or as a felony.

An alien who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for temporary resident status. 8 C.F.R. § 210.3(d)(3).

"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).

It is not clear from the record whether the applicant's hit and run arrest resulted in a conviction, and, if so, whether the conviction was for a misdemeanor or for a felony, which could render the applicant inadmissible, or otherwise ineligible for temporary resident status.

Based upon the foregoing, the applicant has failed to establish by a preponderance of the evidence that he entered the United States before January 1, 1982, continuously resided in an unlawful status in the United States for the requisite period, and is otherwise eligible for adjustment of status, as required under both 8 C.F.R. § 245a.2(d)(5) and *Matter of E- M--, supra.* The applicant has not met his burden of proof because of his failure to establish that he maintained continuous residence in the United States throughout the statutory period, and because of his failure to establish that he does not have a disqualifying criminal conviction. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis. 8 C.F.R. § 245a.18(a)(1).

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