

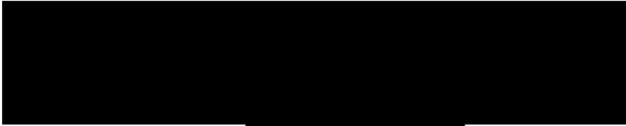
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**U.S. Citizenship
and Immigration
Services**

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FILE:

XSA-880-535-074

Office: California Service Center

Date: **AUG 29 2007**

IN RE:

Applicant:



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. All documents have 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 Director, Western Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The director determined that the applicant failed to establish he entered the United States prior to January 1, 1982. The director noted that the applicant's record indicates he first entered the United States in January of 1982.

On appeal, the applicant submitted a notarized statement corroborating his residence in the United States prior to January 1, 1982.

An applicant for temporary residence 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).

An alien applying for adjustment of status 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).

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.* 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 (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 issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that he continuously resided in the United States from prior to January 1, 1982 through the date he filed a Form I-687 application with the Service.

The applicant filed a Form I-687, Application for Status as a Temporary Resident, with the Service on January 15, 1988. The applicant was interviewed pursuant to this application on February 3, 1988. The applicant indicated on this application that his last date of entry into the United States was on September 20, 1983. Part 32 of this application requests the applicant to list all of his residences in the United States since his first entry. The applicant testified that he resided at [REDACTED], Santa Ana, CA from January 12, 1982 until August 1982. Part 35 of the application requests the applicant to list his absences from the United States since his entry. The applicant testified that he was in Mexico to visit his family from August 1982 until August 1983. The application was amended to reflect the applicant's testimony regarding these dates and the applicant initialed the changes. The applicant's testimony indicates that he entered the United States after January 1, 1982 and he had a one year break in continuous residence between August 1982 and August 1983.

The applicant has the burden of proving by a preponderance of the evidence that he has resided in the United States for the requisite period. 8 C.F.R. § 245a.2(d)(5). The inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. *Id.* To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from his own testimony. 8 C.F.R. § 245a.2(d)(6). The applicant submitted in support of his application the following documents:

- Two statements from [REDACTED], stating that he has known the applicant since either August or September 1983;
- A letter from [REDACTED], Employee Records & Benefits Supervisor, Safeway Stores Incorporated, stating that the applicant has been employed with the company since November 25, 1985;
- A letter from the managing partner of the Mayur stating that the applicant worked with the company from April 1985 until November 1985;
- The applicant's Form W-2, Wage and Tax Statements, from 1985 and 1986; and
- The applicant's Individual Income Tax Returns from 1985 and 1986.

These documents are corroborating evidence of the applicant's residence in the United States subsequent to 1983. Therefore, they do not establish the applicant's residence in the United States during the entire requisite period pursuant to Section 245A(a)(2) of the Act.

Moreover, the applicant's testimony that he first entered the United States on January 12, 1982 renders him ineligible for temporary residence under Section 245A of the Act. An applicant for

temporary residence 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's testimony and corroborating evidence fail to establish that he entered the United States prior to January 1, 1982. The director denied the applicant's Form I-687 application on this basis.

On appeal, the applicant submitted a notarized statement from [REDACTED] which provides:

[REDACTED] lived in my house from November 27, 1981 till December 31, 1981. He was frequently in my house by the person who brought [sic] him into the United States of America, which was the man who I was dating. They were my next door neighbors. We still keep in contact with several members of the family.

Although this statement provides some detailed information on [REDACTED]'s relationship with the applicant during the requisite period, it does not alone satisfy the applicant's burden of proof. As stated above, 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). The applicant has been given the opportunity to satisfy his burden of proof with a broad range of evidence pursuant to 8 C.F.R. § 245a.2(d)(3). The applicant submitted one notarized statement to satisfy his burden of proof. The applicant's failure to provide any other evidence to establish his residence in the United States prior to January 1, 1982 renders a finding that the applicant has failed to satisfy his burden of proof, as required by 8 C.F.R. § 245a.2(d)(5). The applicant has not submitted sufficient evidence to establish that his claim is "probably true" pursuant to *Matter of E-M-*, *supra*.

Even if the applicant had established that he entered the United States prior to January 1, 1982, he has failed to establish that his residence during the requisite period was continuous. An alien shall be regarded as having resided continuously in the United States if at the time of filing an application for temporary resident status, no single absence from the United States has exceeded forty-five (45) days, and the aggregate of all absences has not exceeded one hundred and eighty (180) days between January 1, 1982, through the date the application is filed, unless the alien can establish that due to emergent reasons the return to the United States could not be accomplished within the time period allowed, the alien was maintaining residence in the United States, and the departure was not based on an order of deportation. 8 C.F.R. § 245a.1(c). The information contained in the applicant's Form I-687 indicates that he was absent from the United States from August 1982 until August 1983 to visit his family in Mexico. If the applicant's absence exceeds 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." The applicant has failed to indicate that there was an emergent reason for his one year absence from the United States. Therefore, the applicant is

ineligible for temporary residence under Section 245A of the Act on this basis as well. An application or that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

An applicant for temporary resident status must establish that he has not been convicted of any felony or of three or more misdemeanors committed in the United States. Section 245A(a)(4) of the Act, 8 U.S.C. § 1255a(a)(4). "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).

An FBI report based upon the applicant's fingerprints reveals that on February 6, 2005, the applicant was arrested and twice charged with *Driving Under the Influence* in violation of section 23152 of the California Vehicle Code. The FBI report does not contain information on the final disposition related to these charges. Additionally, the applicant's record does not contain a court disposition related to this arrest. Section 23536 of the California Vehicle Code provides that the sentencing for a first violation of *Driving Under the Influence* is imprisonment in the county jail for not less than 96 hours nor more than six months, and by a fine of not less than three hundred ninety dollars (\$390), nor more than one thousand dollars (\$1,000). Based on this sentencing guideline, the applicant has been charged with two misdemeanor offenses pursuant to 8 C.F.R. § 245a.1(o). In the absence of final dispositions of the charges, the AAO is unable to determine whether the applicant's criminal history affects his eligibility for immigrant classification under section 245A(a)(4) of the Act.

In conclusion, the absence of sufficiently detailed supporting documentation to corroborate the applicant's claim of continuous residence for the entire requisite period seriously detracts from the credibility of this claim. Pursuant to 8 C.F.R. § 245a.2(d)(5), the inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. Given the applicant's reliance upon documents with minimal probative value, it is concluded that he has failed to establish continuous residence in an unlawful status in the United States from prior to January 1, 1982 through the date he attempted to file a Form I-687 application as required under both 8 C.F.R. § 245a.2(d)(5) and *Matter of E- M-*, *supra*. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis.



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