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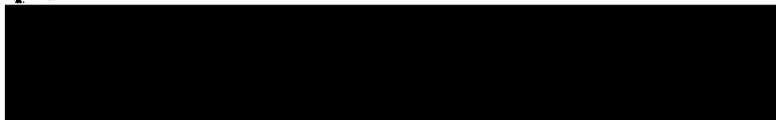
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
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U.S. Citizenship
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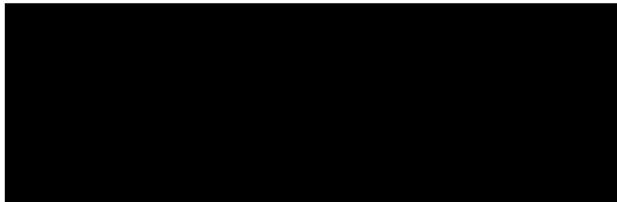
FILE: [Redacted] Office: New York
MSC 05 244 15640

Date: MAY 30 2007

IN RE: Applicant: [Redacted]

PETITION: 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:



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 the matter 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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, 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 District Director, New York, New York, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The district director determined that the applicant had not demonstrated that he had continuously resided in the United States in an unlawful status since before January 1, 1982 through the date that he attempted to file a Form I-687, Application for Status as a Temporary Resident, with the Immigration and Naturalization Service or the Service (now Citizenship and Immigration Services or CIS) in the original legalization application period between May 5, 1987 to May 4, 1988. Therefore, the district director concluded that the applicant was not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements and denied the application.

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. *See* section 245A(a)(2) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1255a(a)(2) and 8 C.F.R. § 245a.2(b).

An alien applying for adjustment to temporary resident status must establish that he or she has been continuously physically present in the United States since November 6, 1986. *See* section 245A(a)(3) of the Act and 8 C.F.R. § 245a.2(b)(1).

For purposes of establishing residence and presence in accordance with the regulation at 8 C.F.R. § 245a.2(b), “until the date of filing” shall mean until the date the alien attempted to file a completed Form I-687 application and fee or was caused not to timely file, consistent with the class member definitions set forth in the CSS/Newman Settlement Agreements. *See* Paragraph 11, page 6 of the CSS Settlement Agreement and paragraph 11, page 10 of the Newman Settlement Agreement.

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. *See* 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 including affidavits is permitted pursuant to 8 C.F.R. § 245a.2(d)(3)(vi)(L).

8 C.F.R. § 245a.2(d)(3)(v) states that attestations by churches, unions, or other organizations to the applicant's residence by letter must: identify applicant by name; be signed by an official (whose title is shown); show inclusive dates of membership; state the address where applicant resided during

membership period; include the seal of the organization impressed on the letter or the letterhead of the organization, if the organization has letterhead stationery; establish how the author knows the applicant; and, establish the origin of the information being attested to.

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.

At issue in this proceeding is whether the applicant has submitted sufficient credible evidence to establish continuous residence in the United States from prior to January 1, 1982 through the date he attempted to file a Form I-687 application with the Service in the original legalization application period from May 5, 1987 to May 4, 1988. Here, the submitted evidence is relevant, probative, and credible.

The record shows that the applicant submitted a Form I-687 application and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet, to CIS on June 1, 2005. The record contains the following evidence submitted by the applicant in support of his claim of continuous residence in the United States since prior to January 1, 1982: eight affidavits of residence, a letter of membership from a church, two employment letters, five original receipts, and a letter from a doctor.

In the notice of intent to deny issued on July 8, 2004, the district director questioned the veracity of the applicant's claimed residence in the United States for the requisite period. Specifically, the district director stated that the applicant submitted only affidavits that do not establish that he entered the United States before January 1, 1982 and resided in a continuous unlawful status through May 4, 1988. In addition, the district director declared that affidavits submitted by the applicant were not credible because the affidavits did not include some document identifying the affiant, some proof that the affiant was present in the United States during the requisite period, some proof that there was relationship between the applicant and the affiant such as photographs, etc., and a current number phone number at which the affiant could be contacted for verification purposes. However, the district director failed to acknowledge that the applicant had submitted five contemporaneous and original receipts in support of his claim. Further, a review of the pertinent statutes and regulations finds no support for the standards utilized to determine that affidavits and letters provided by the applicant

were not credible. Moreover, the record contains no evidence to demonstrate any effort was made to verify the testimony contained in the supporting evidence despite the fact that the majority of supporting documents provided by the applicant list either a telephone number or address by which the affiant of each respective document could have been contacted at the time such document was executed. Pursuant to *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989), affidavits in certain cases *can* effectively meet the preponderance of evidence standard, and the district director cannot disregard and must consider such evidence whether or not it is unaccompanied by other forms of documentation.

The statements both in response to the notice of intent to deny and on appeal regarding the amount and sufficiency of the applicant's evidence of residence, as well as his status as an illegal alien during the requisite period and the significant and considerable passage of time have been considered. Furthermore, it must be noted that the applicant provided additional documentation consisting of two affidavits, a copy of a prescription form, letter, and business card from a doctor, a photocopied page of listings from the Queens White Pages of January 2004, and another letter of membership from his church. In this instance, the applicant submitted evidence, including contemporaneous documents, affidavits, and letters, which tends to corroborate his claim of residence in the United States during the requisite period. The district director has not established that the information in this evidence was inconsistent with the claims made on the application, or that it was false information. As stated in *Matter of E-M-*, when something is to be established by a preponderance of evidence, the proof submitted by the applicant has to establish only that the assertion or asserted claim is probably true. *Id.* That decision also points out that, under the preponderance of evidence standard, an application may be granted even though some doubt remains regarding the evidence. The documents that have been furnished may be accorded substantial evidentiary weight and are sufficient to meet the applicant's burden of proof of residence in the United States for the requisite period.

The documentation provided by the applicant establishes by a preponderance of the evidence that he satisfies the statutory and regulatory criteria of entry into the United States before January 1, 1982, as well as continuous unlawful residence in the country during the ensuing time frame of January 1, 1982 through May 4, 1988, as required for eligibility under section 245A(a)(2) of the Act. Consequently, the applicant has overcome the basis of denial cited by the district director.

It is noted that the record contains court documents that demonstrate the following related to the applicant's criminal record:

The applicant was arrested on August 19, 1992 by the New York City Police Department (NYSID Number [REDACTED]) and charged with a violation of section 165.40 of the New York Penal Code, Criminal possession of stolen property in the fourth degree, a class E felony and a separate violation of section 165.45 of the New York Penal Code, Criminal possession of stolen property in the fifth degree, a class A misdemeanor. The case was assigned docket number [REDACTED] and both charges were subsequently dismissed on the motion of the District Attorney in Criminal Court of the City of New York County of New York on February 18, 1993.

The applicant was arrested on September 5, 1996 by the New York City Police Department (NYSID Number [REDACTED]) and charged with two separate counts for violations of section 130.55 of the New

York Penal Code. Sexual abuse in the third degree, a class B misdemeanor. The case was assigned docket number [REDACTED] and the applicant subsequently pleaded guilty to a single violation of section 130.55 of the New York Penal Code in Criminal Court of the City of New York County of Queens on March 18, 1997. Although the court document did not indicate that the applicant was sentenced to a term of imprisonment for this conviction, the document reflected that an order of protection was invoked against him with an offer of a conditional discharge after a one-year period from the date of his conviction.

“A person is guilty of sexual abuse in the third degree when he or she subjects another person to sexual contact without the latter’s consent....” Section 130.55 of the New York Penal Code. The court documents contained in the record to demonstrate that the offense for which the applicant had been convicted was not perpetrated against a minor. Consequently, the applicant’s criminal conviction of third degree sexual abuse cannot be considered as an “aggravated felony” under section 101(a)(43)(A) of the Act. However, the applicant’s conviction for sexual abuse in the third degree must be considered to be that of a crime involving moral turpitude under the decision reached in *Matter of Z-*, 7 I&N Dec. 253 (BIA 1956). At page 255 of the decision, the court stated, “An indecent assault consists of the act of a male person taking indecent liberties with the person of a female or fondling her in a lewd or lascivious manner without her consent and against her will, but with no intent to commit the crime of rape.” *Id.* The elements of the crime, third degree sexual abuse, correspond to the elements of the crime of indecent assault examined in *Matter of Z-*.

An alien is inadmissible to the United States if he has been convicted of a crime involving moral turpitude (other than a purely political offense), or if he admits having committed such crime, or if he admits committing an act which constitutes the essential elements of such crime. *See* Section 212(a)(2)(A)(i)(I) of the Act, formerly section 212(a)(9) of the Act.

However, an alien is not inadmissible if the maximum penalty possible for the crime of which the alien as convicted did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of six months (regardless of the extent to which the sentence was ultimately executed.) *See* section 212(a)(2)(A)(ii)(II) of the Act.

Under section 70.15 of the New York Penal Code, a sentence of imprisonment for a conviction of a class B misdemeanor shall not exceed three months. As discussed above, the court document in the record demonstrated that the applicant was convicted of a class B misdemeanor, specifically sexual abuse in the third degree, with no sentence of imprisonment. Thus, the applicant meets the “exception clause” of section 212(a)(2)(A)(ii)(II) of the Act, and he is not inadmissible.

Accordingly, the applicant’s appeal will be sustained. The district director shall continue the adjudication of the application for temporary resident status.

ORDER: The appeal is sustained.