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U.S. Citizenship
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Services

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FILE: [REDACTED]
MSC-05-041-10179

Office: MIAMI

Date: DEC 29 2008

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:



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.

A handwritten signature in black ink, appearing to read "John F. Grissom".

John F. Grissom, Acting 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, Miami. 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. The director denied the application, finding that the applicant 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 period.

On appeal, counsel for the applicant asserts that the director did not fully consider the evidence submitted by the applicant in support of his application. Counsel goes on to request an additional 60 days within which to submit additional evidence.

It is noted that on November 4, 2008, the AAO sent a fax to counsel requesting that he submit additional evidence in support of the application. However, as of the date of this decision, counsel has not responded to this fax or submitted additional evidence for consideration. Therefore, the record is considered complete.

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).

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) 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 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). To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from the applicant's own testimony, and the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility. 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, *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. *See* 8 C.F.R. § 245a.2(d)(6). The weight to be given any affidavit depends on the totality of the circumstances, and a number of factors must be considered. More weight will be given to an affidavit in which the affiant indicates personal knowledge of the applicant's whereabouts during the time period in question rather than a fill-in-the-blank affidavit that provides generic information. The regulations provide specific guidance on the sufficiency of documentation when proving residence through evidence of past employment or attestations by churches or other organizations. 8 C.F.R. §§ 245a.2(d)(3)(i) and (v).

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 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 statutory language at section 245A(b)(1)(C) of the Act provides that the alien "must establish that he is (i) is admissible...and (2) has not been convicted of any felony or 3 or more misdemeanors."

"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 applicant's fingerprint record revealed that he has been arrested and convicted of two offenses. The applicant was arrested by the Village Police Department in Port Chester, New York on or about March 17, 1991 for *Driving While Intoxicated*. Subsequently, as a result of this arrest, the applicant was convicted of a violation of VTL § 1192.1, *Operating a Motor Vehicle While Impaired by Alcohol*. Though VTL § 1193.1(a) indicates that a conviction under this section of law is an infraction, it also states that a conviction under this section is punishable, "by a fine of not less than three hundred dollars nor more than five hundred dollars or **by imprisonment in a penitentiary or country jail for not more than fifteen days.**" Therefore, in accordance with the previously noted misdemeanor definition, for immigration purposes, this is a misdemeanor offense.

The applicant was arrested for a second time by the Village Police Department of Port Chester on or about September 28, 1992 for *Driving While Intoxicated More than 10/100 of One Percent*. As a result of this arrest, the applicant was convicted upon a plea of guilty of VTL §1192.3 *Operating a Motor Vehicle While Intoxicated in the 1st Degree*, which is a misdemeanor if it is a first offense under this section of the law.

These two misdemeanor convictions alone do not cause the applicant to be inadmissible pursuant to 245A(b)(1)(C) of the Act.

The issue in this proceeding is whether the applicant has establish 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 two affidavits; a copy of the applicant's passport issued in March 1988; and copies of the applicant's identification and employment authorization cards. 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 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.

Affiant [REDACTED] states that he met the applicant in California in 1980 and asserts that he has been friends with the applicant since that time. However, the affiant does not state whether he knows if the applicant resided in the United States during the requisite period. Therefore, this affidavit carries no weight as evidence that the applicant did so.

Affiant [REDACTED] states that he has known the applicant for 24 years. As his affidavit is dated October 16, 2006, this indicates that he has known the applicant since approximately 1982. He states that they met through “a local soccer league” and asserts that he and the applicant managed a soccer team together. However, he does not state where this soccer team was or whether it was in the United States. He does not state whether he knows if the applicant ever resided in the United States during the requisite period. Therefore, this affidavit carries no weight as evidence that the applicant resided in the United States during the requisite period.

The record contains two Forms I-687 completed by the applicant in December 1989 and November 2004. These Forms I-687 shall be referred to as the applicant’s 1989 Form I-687 and his current Form I-687 respectively. These Forms I-687 are not consistent regarding when the applicant first entered or was absent from the United States. The applicant’s 1989 Form I-687 states that he last entered the United States in November 1979 and that he had never been absent from the United States from that date of entry until the date he signed that form in December 1989. The applicant’s current Form I-687 indicates that his residence in the United States began in 1981. He further states that he was absent from the United States three times during the requisite period: from December 1981 to January 1982; from December 1984 to January 1985; and from December 1986 to January 1987. These inconsistencies cast doubt on whether the applicant has accurately represented both his date of first entry and his absences from the United States during the requisite period accurately to USCIS. 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 petitioner submits competent 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Also in the record are photocopies of identity documents issued to the applicant. These include his passport, a California Identification Card, an Employment Authorization Card, and a New York State Driver’s License.

Page three of the applicant’s passport in the record, Passport # [REDACTED] states that it was issued to the applicant in Caracas, Venezuela on March 30, 1988. This indicates that the applicant was in Venezuela and therefore absent from the United States on that date. However, this does not correspond with an absence stated on either of the applicant’s Forms I-687. This inconsistency also casts doubt on whether the applicant has fully disclosed his absences from the United States during the requisite period.

The remaining identity documents in the record include a California Identification Card that was issued to the applicant in 1989, An Employment Authorization Card issued to the applicant in December 1989; and a New York State Driver’s License issued to the applicant in July 1991. While these documents are proof of the applicant’s identity, they were not issued during the requisite period and therefore, they are not evidence of his residence in the United States during that time.

The inconsistencies in the record as noted previously regarding when the applicant first entered the United States and when he was absent from the United States during the requisite period 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. As stated previously, 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. *See Matter of Ho, supra.*

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.

Therefore, 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 and continuously resided in an unlawful status in the United States for the requisite period 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.