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FILE:



Office: LOS ANGELES

Date: SEP 18 2008

MSC-06-046-10248

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. 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.

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, Los Angeles. 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 determined 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. Specifically, the director stated that the applicant did not provide evidence of his residence in the United States during the requisite period. The director went on to note that the applicant was issued a Form I-72 Request for Evidence in which he was asked to provide her office with additional evidence. The director noted that her office received a response to the Form I-72, but stated that this response was incomplete. Therefore, the director found the applicant failed to meet his burden of proving that he resided in the United States for the duration of the requisite period by a preponderance of the evidence. Because the applicant had not met his burden of proof, the director found he was not eligible to adjust to Temporary Resident Status pursuant to the terms of the CSS/Newman Settlement Agreements and she denied his application.

On appeal, the applicant asserts that he did provide the documents requested of him in response to the director's Form I-72 Request for Evidence.

On June 18, 2008 the AAO submitted a request for more information to the applicant regarding his August 15, 1997 arrest and subsequent conviction on August 20, 1997 for a violation of California Penal Code (CPC) § 459, *Burglary*. In this request for information, the AAO stated that a court disposition for this conviction was necessary to determine the applicant's eligibility for the benefit sought, as CPC § 461 states that *Burglary* is an offense that is punishable as either a misdemeanor or a felony. The AAO provided the applicant with the address of the California Department of Justice and stated that if that Department could not find records pertaining to this arrest, the applicant could submit affidavits from two individuals who had direct knowledge of the arrests and dispositions of those arrests. The AAO granted the applicant 45 days within which to submit documents pertaining to this arrest and his subsequent conviction. As of the date of this decision, the AAO has not received any additional documentation from the applicant. Therefore, the record will be 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)(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) 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).

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.* at 80. 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 has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421, 431 (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).

At issue in this proceeding is whether the applicant has submitted sufficient credible evidence to meet his burden of establishing continuous unlawful residence in the United States during the requisite period and whether he has met that same burden in establishing that he is otherwise eligible to adjust to Temporary Resident Status. Here, the applicant has failed to meet this burden.

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 November 15, 2005. Parts #19 and #20 of this application ask the applicant to list his parent’s names. Here, he indicated his mother’s name is [REDACTED] and his father’s name is [REDACTED]. At part #30 of the Form I-687 application where applicants were asked to list all residences in the United States since first entry, the applicant indicated his address in the United States during the requisite period to be [REDACTED] in Santa Ana, California where he resided from 1978 until June 1991. At part #32 where the applicant was asked to list all of his absences from the United States, he indicated that he was absent from May to June 1987 when he went to Mexico because his uncle passed away. At part #33, where the applicant was asked to list all of his employment in the United States since he first entered, he indicated that he was not employed during any part of the requisite period. Here, he indicated that his first employment was in 1994, when he worked as a shift manager for Dejon Enterprises. However, it is noted that the applicant was a minor for the duration of the requisite period.<sup>1</sup> Therefore, is reasonable that he did not indicate that he was employed during that time.

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). To meet his burden of

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<sup>1</sup> As the applicant’s date of birth is July 4, 1976, he would have been five years old in on January 1, 1982 and 11 years old on May 4, 1988.

proof, an applicant must provide evidence of eligibility apart from his own testimony. 8 C.F.R. § 245a.2(d)(6). The regulation at 8 C.F.R. § 245a.2(d)(3) provides an illustrative list of documentation that an applicant may submit to establish proof of continuous residence in the United States during the requisite period. This list includes: past employment records; utility bills; school records; hospital or medical records; attestations by churches, unions or other organizations; money order receipts; passport entries; birth certificates of children; bank books; letters or correspondence involving the applicant; social security card; selective service card; automobile receipts and registration; deeds, mortgages or contracts; tax receipts; and insurance policies, receipts or letters. An applicant may also submit any other relevant document pursuant to 8 C.F.R. § 245a.2(d)(3)(vi)(L).

Here, the applicant submitted the following evidence that he resided in the United States for the requisite period:

Affidavits:

- An affidavit from [REDACTED] who states that the applicant left the United States on August 9, 1987. This letter was notarized on September 17, 1990.
- A letter written in Spanish from The Morovia Sports Union, or Union Deportiva Morovia, located in South Gate, California. This letter is dated April 28, 1990 and states that the applicant played on their team from June 20, 1985 until the date the letter was signed. This letter is signed by both [REDACTED] the Secretary and [REDACTED] the President.

Medical documents:

- A photocopy of the applicant's vaccination records indicating he received Polio vaccinations in 1978 and 1979, from the Orange County Public Health Center and DPT/DT in 1980 and 1981 from the Orange County Public Health Center in Orange County, California.
- A letter from the Clinica Medica Familiar signed by [REDACTED] who states that the applicant was a patient of the clinic in California from 1983 until January 6, 1988.

School documents:

- A print out from the Santa Ana Unified School District indicating that as of May 21, 1982 the applicant, who resided at [REDACTED] was a registered student in that school district. It is noted that the address indicates on this document is consistent with the address the applicant indicated he resided at for the duration of the requisite period.

Other documents:

- An envelope from the Human Services Agency in Santa Ana to the parents of [REDACTED]. This envelope is date stamped September 13, 1979.
- A certificate of Achievement indicating the applicant participated in the Emergency Immigrant Education Assistance Program. This certificate was signed on June 19, 1983.

Family photographs that are not labeled.

Though there are numerous photographs of the applicant submitted with his application, the AAO cannot determine when and where the photographs relating to the requisite period were taken. Therefore these carry minimal weight as proof that the applicant resided continuously in the United States for the duration of the requisite period.

Other documents:

- The applicant's mother's California Identification Card issued to her in 1980 that indicates she resided at [REDACTED] in Santa Ana, California.

The applicant has submitted immunization records indicating that he was in a clinic in Orange, California in 1978, 1979, 1980 and 1981. He has indicated that he was registered in a school district in Santa Ana in 1982. He submitted evidence of that he was a patient in a medical clinic during the requisite period. He has stated he participated in a course in 1983 and that he was on a soccer team from 1985 until 1990. He also submitted an identification card indicating his mother resided in the United States before January 1, 1982.

On January 9, 2007, the Director of the Los Angeles District Office issued a Form I-72 to the applicant informing him that he needed to provide school transcripts from 1981 until 1989; childhood vaccination card record for the years 1981 until 1989 and original certified court dispositions regarding his arrest on August 15, 1997.

In response to this Form I-72, the applicant submitted school transcripts as follows:

- A record of vision exams performed by his school when he was a student in the Santa Ana Unified School District in Santa Ana, California. This document indicates the applicant underwent vision exams in 1981, 1982, 1983, 1984, 1985 and 1986. This document also indicates the applicant underwent a hearing exam in both 1988 and 1989 and that the school had records that he had been immunized against childhood diseases in 1978, 1979, 1980, 1981, 1982 and 1983.
- A transcript from Santa Ana School district indicating the applicant's academic record in grades six, seven and eight from 1987, 1988 and 1989 respectively. These records state the applicant attended school in the United States without absences during those years.

- School records from Tustin Unified School District for the years 1991 to 1994.
- The results of two Record Search Information queries performed by Orange County Superior Court. These Forms I1209 are both dated February 15, 2007 and state that there were no arrest records for [REDACTED] or for [REDACTED]. It is noted that these Forms indicate that a records search was conducted for 1997 through 2007. However, the record reflects that the applicant, who used the alias [REDACTED] was arrested in 1997 by the Santa Ana Sherriff's Office. The applicant did not submit a court disposition for his arrest using that alias with his Form I-687 application or in submissions responding to requests for evidence in support of that application. However, as was previously noted, the record in his alien file [REDACTED] does contain documents pertaining to that arrest and these documents indicate that the applicant was convicted of *burglary* as a result of the arrest.

The director issued her decision on April 12, 2007. In her decision, she stated that the applicant did not submit any evidence of his residence in the United States during the requisite period. The director went on to say that her office received the applicant's response to the Form I-72 Request for Evidence timely. She stated that the applicant submitted documents indicating that no records regarding his arrest were found and stated that the applicant failed to provide his school and immunization records.

Here, the AAO notes that the director erred by stating that the applicant did not submit his immunization and school records. While he did not submit transcripts from elementary school, he did submit a record from his school district indicating he underwent yearly physical examinations in that school. He also submitted transcripts from middle and high schools. When considered as a whole, these records indicate the applicant was present in the United States for every year from 1978 until 1989. However, it is noted here that this error did not cause the applicant harm. 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 been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Here, the AAO finds the applicant did submit the documents as noted above in response to the director's Form I-72. Therefore, the AAO withdraws the director's statement that the applicant failed to submit school and immunization records corresponding with years during the requisite period. With these documents, the applicant also submitted the previously noted documents stating that there are no records indicating that he has been arrested using either his own name or the name [REDACTED].

On appeal, the applicant asserts that, contrary to the director's assertion, he did submit requested documents. He states that he personally took them to the District Office in Los Angeles. He requests a review of his case.

As was previously noted, the record reflects that the applicant submitted school records and vaccination records. However, evidence in the record causes the applicant to fail to establish that he is admissible as an immigrant.

The applicant has a second record under Alien Number, [REDACTED]. This record was created for the applicant when he used the name [REDACTED]. This record for [REDACTED] indicates that at the time of his August 15, 1997 arrest by the Santa Ana Sherriff's Office, [REDACTED] stated that his parent's names were [REDACTED] and [REDACTED]. These are the names of the applicant's parents. It is further noted that the fingerprints of [REDACTED] and of this applicant are one and the same.

Also in the applicant's second record is an Immigration Detainer Notice of Action indicating that on August 16, 1997 the applicant was detained and in investigation was initiated to determine whether he was subject to removal from the United States. Also in this record is a Form I-862 Notice to Appear indicating that on August 21, 1997 the applicant was placed in removal proceedings. This record also contains a Form I-266 Notice of Custody Determination that indicates the applicant was detained in the custody of the Service on August 21, 1997 and a Form I-200 Warrant of Arrest of Alien that states that the applicant entered the United States without inspection on an unknown date in July 1991 and therefore was taken into custody.

Further in this record is a form I-265 Notice to Appear, Bond and Custody Processing Sheet that indicates the applicant was charged under section 212(a)(6)(A)(i) as inadmissible, and held on no bond on August 21, 1997. This notice indicates that on August 20, 1997 the applicant was convicted of a violation of the CPC § 459, *Burglary*. The record indicates the applicant was sentenced to serving ten days and then granted voluntary return to Mexico as a result of this conviction.

CPC § 461 states that punishment for an offense of *burglary* as follows: 1. *Burglary* in the first degree: by imprisonment in the state prison for two, four, or six years. 2. *Burglary* in the second degree: by imprisonment in the county jail not exceeding one year or in the state prison.

Section 245A(b)(1)(C) of the Act states that the applicant bears the burden of proving that he or she has not been convicted of a felony. Here, the applicant was convicted of a crime that is punishable as either a felony or a misdemeanor. He has failed to provide a court disposition regarding this conviction. The AAO informed the applicant that a disposition regarding this conviction was necessary to determine whether the applicant was eligible to adjust to temporary resident status and provided him with 45 days to submit either a court disposition or, in the alternative, proof that no such disposition existed and affidavits from two individuals who had personal knowledge of this arrest and its resulting disposition. The applicant failed to respond to the AAO's request for this additional information.

Therefore, the AAO cannot determine whether the applicant was convicted of a felony or a misdemeanor. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Therefore, it is concluded that the applicant has not met his burden of proving that he is eligible to adjust status to that of a temporary resident. 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