

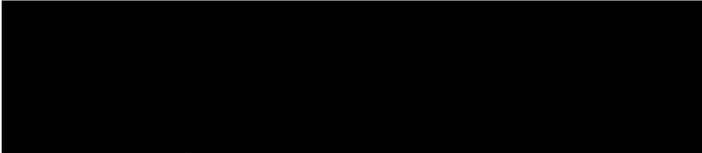
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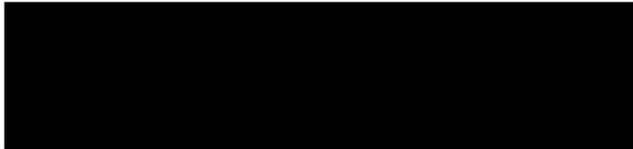
MSC-05-046-11555

Office: LOS ANGELES

Date: **SEP 22 2008**

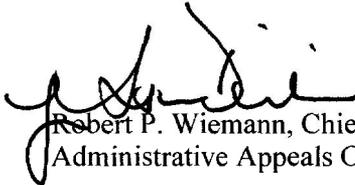
APPLICATION: Application for Status as a Temporary Resident pursuant to Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

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.


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 been convicted of a felony and, therefore, that he was not eligible for temporary resident status on that basis. 8 C.F.R. § 245a.2(c)(1).

On appeal, prior counsel for the applicant stated that the applicant was convicted under a “wobbler” statute and, therefore, has not been convicted of a felony.

The first issue to be determined is whether the applicant was convicted of a felony and, as a result, is ineligible for temporary resident status on this basis. To be eligible for temporary resident status, an individual must not have been convicted of any felony or of three or more misdemeanors. 8 C.F.R. § 245a.2(c)(1). 8 C.F.R. § 245a.1(p) defines a felony as a crime committed in the United States, punishable by imprisonment for a term of more than one year, regardless of the term such applicant 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 applicant actually served.

The applicant submitted a copy of the Minute Order from the Superior Court of the State of California, County of Ventura, Case No. [REDACTED] dated May 6, 2002. This document indicates that the applicant was convicted on September 21, 2000 of count one, *inflicting injury on a spouse/cohabitant* in violation of section 273.5(a) of the California Penal Code. The document lists this crime as a felony. The director found the applicant inadmissible to the United States on this basis in her decision issued on July 26, 2005. The document indicates that imposition of sentence for this crime was suspended on September 21, 2000. On appeal, the applicant provided a copy of the Minute Order from the Superior Court of the State of California, County of Ventura, Case No. [REDACTED] dated November 28, 2007. This document lists count one, *inflicting injury on a spouse/cohabitant* in violation of section 273.5(a) of the California Penal Code, as a misdemeanor. The document indicates that on November 28, 2007, the court ordered that the case was a misdemeanor and not a felony, and that count one be clerically corrected. The document lists the applicant’s sentence as 10 days in jail and 36 months probation. This document establishes that the applicant was convicted of an offense defined by the State of California as a misdemeanor where the sentence actually imposed was one year or less. Therefore, the applicant has established that he was not convicted of a felony and,

consequently, is not ineligible for temporary status pursuant to 8 C.F.R. § 245a.2(c)(1) on that basis.¹

The second issue to be determined 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. Here, the applicant has failed to meet this burden.

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 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

¹ It is noted that the director did not raise the issue of whether the applicant has been convicted of a crime involving moral turpitude and is, therefore, inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act and 8 C.F.R. § 245a.2(c)(3).

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, 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 record shows that the applicant submitted a Form I-687 application and Supplement to Citizenship and Immigration Services (CIS) on November 15, 2004. At part #30 of the Form I-687, where applicants were asked to list all residences in the United States, the applicant listed the following addresses during the requisite period: [REDACTED] California from February 1985 to May 1987; and [REDACTED] California from June 1987 to May 1990. The immigration officer who conducted the applicant’s interview also appears to have written the following address on the Form I-687 at the applicant’s request: [REDACTED], California from October 1981 to February 1985. The applicant’s initial failure to indicate on his Form I-687 that he resided in the United States prior to February 1985 casts some doubt on his claim to have resided in the United States continuously throughout the requisite period.

The record of the applicant’s submissions to CIS includes a Form I-589 Application for Asylum and for Withholding of Deportation submitted on January 24, 1996 and signed by the applicant under penalty of perjury on December 7, 1995. At Part E where applicants were asked to list education, the applicant indicated that he attended Secundaria, junior high school, in Mexico from 1982 to 1989. This statement conflicts with the applicant’s statements on Form I-687 indicating that he resided in the United States between 1982 and 1989, and casts serious doubt on his claim to have resided in the United States throughout the requisite period. This statement also indicates that the applicant has made material misrepresentations and utilized documents in a fraudulent manner in an attempt to establish his residence within the United States for the requisite period.

In an attempt to establish his continuous unlawful residence in this country since prior to January 1, 1982, the applicant provided multiple documents that do not relate to the requisite period, including copies of income tax returns and other documents. The applicant also provided multiple attestations. These include:

- An affidavit from [REDACTED], President of Rico Farm Labor. In this affidavit, Mr. [REDACTED] stated that the applicant was employed by [REDACTED] farm labor contracting

firm for a total of 105 days from May 1, 1985 to May 1, 1986. Since the affidavit only confirms 105 days of employment out of one year, the affidavit fails to specifically confirm that the applicant resided continuously in the United States for any part of the requisite period. In addition, the affidavit does not conform to regulatory standards for letters from employers as stated in 8 C.F.R. § 245a.2(d)(3)(i). Specifically, the affidavit does not include the applicant's address at the time of employment, whether or not the information was taken from official company records, where the records are located, and whether CIS may have access to the records. Therefore, this document will be given very little weight in determining whether the applicant has established that he resided in the United States throughout the requisite period.

- An affidavit from [REDACTED] dated May 21, 2005. In this affidavit, the affiant stated that he has known the applicant since 1981. He stated that "[d]uring that time," the applicant helped him with cleaning the house and with cars. He also stated that, during that time, he was in charge of the applicant's personal expenses until the applicant began to work for himself and was able to sustain himself. Since the affiant failed to indicate where the applicant was living after he met the applicant, the affidavit fails to indicate that the applicant resided in the United States during the requisite period. The affidavit also fails to provide details regarding how the affiant met the applicant, and how the affiant came to be responsible for the applicant's expenses. As a result of these deficiencies, this affidavit will be given no weight in determining whether the applicant has established that he resided in the United States throughout the requisite period.
- Another affidavit from [REDACTED] that is undated. This affidavit contains a notary stamp and signature which are also undated. This casts doubt on the authenticity of the notary stamp and, as a result, casts doubt on the authenticity of the affidavit itself. This affidavit states that the affiant has personal knowledge that the applicant resided in Santa Paula, California from October 1981 to present. Since the affidavit is undated, it fails to confirm that the applicant resided in the United States during the requisite period, other than in October 1981. In addition, this affidavit lacks detail regarding how the affiant met the applicant and regarding the origin of the affiant's personal knowledge of the applicant's residence during the requisite period. As a result of these deficiencies, this document will be given only limited weight in establishing that the applicant resided in the United States during October 1981.
- An affidavit notarized on May 21, 2005 from [REDACTED] that is identical to the undated affidavit from [REDACTED]. This affidavit states that the affiant has personal knowledge that the applicant resided in Santa Paula, California from October 1981 to present. This affidavit fails to include detail regarding when and how the affiant met the applicant, his frequency of contact with the applicant

during the requisite period, and the applicant's specific addresses during that time. As a result, this affidavit is found to lack sufficient detail to confirm that the applicant resided in the United States during the requisite period.

- **An affidavit notarized on May 21, 2005 from [REDACTED]** This affidavit states that the affiant has personal knowledge that the applicant resided in Santa Paula, California from October 1981 to present. Since the affidavit is undated, it fails to confirm that the applicant resided in the United States during the requisite period, other than in October 1981. In addition, this affidavit lacks detail regarding how the affiant met the applicant and regarding the origin of the affiant's personal knowledge of the applicant's residence during the requisite period. As a result of these deficiencies, this document will be given only limited weight in establishing that the applicant resided in the United States during October 1981.

On March 12, 2006, the AAO issued a notice of derogatory information to the applicant detailing the above referenced concerns regarding the evidence submitted by the applicant in support of his claim to meet the residency requirements for temporary resident status.

In response to the notice from the AAO, the applicant provided attestations from himself and several other individuals. In a declaration dated April 21, 2008, the applicant stated that he never intentionally misrepresented his address between 1982 and 1989. The applicant stated that "the conflicting information contained on submitted Form I-589 and the statement contained on I-687 were purely negligent errors made by [REDACTED] who was the Director of Guevara & Quintanilla Associates." The applicant stated that he never retained any attorneys "in pursuit of [his] petition for I-687 and I-589," and that he never had any intention to defraud the United States government to obtain his legal status. The applicant stated that he could have forgotten the exact dates of his junior high school attendance, since it was a long time ago, but he definitely lived in the United States from 1982 to 1989 except a short visit back to Mexico. He stated that he finished all his elementary and secondary schools before February of 1985 and started living continuously in the United States since then. He stated that he attempted to obtain all the evidence requested, but many of his witnesses were out of town and he could not obtain their testimony until recently. The applicant also requested that he be provided with one more opportunity to clarify and testify to the truth of his statement contained on the Form I-589. He stated that the error was a result of the negligence of a third party representative.

In an additional declaration from himself dated April 28, 2008, the applicant stated that the notary public, [REDACTED] never asked for the applicant's school record when he helped the applicant with the Form I-589 and I-687 applications. He stated that he admits he was negligent in not asking to do a final check of the information in the forms before [REDACTED] submitted them. The applicant also admitted that he could not remember the exact date of his end of high school because it was more than 20 years ago. He stated that he erred in listing the end of his high school education as May instead of February. He stated that he never intentionally misrepresented his address during his stay in the United States, and the conflicting information

on the forms indicates negligent errors on the part of his representative. He stated that he has no knowledge about the true meaning of the I-687 and I-589 forms and was told only that he would get a green card if he paid [REDACTED] money.

The information provided in the applicant's declarations is found to be insufficient to overcome the inconsistencies identified by the AAO between his claim of continuous residence in the United States during the requisite period and his statements on his Form I-589. 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 applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Therefore, standing alone, the applicant's statements in his declaration are insufficient to overcome the inconsistencies identified by the AAO. It is also noted that the applicant's April 21, 2008 statement appears to indicate that he did not begin his continuous residence in the United States until 1985. This statement undermines the applicant's claim to have resided continuously in the United States throughout the requisite period.

The applicant has raised the issue of ineffective assistance of a representative. It is noted that any appeal based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved applicant setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the applicant in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

Although the applicant noted that he had not hired an attorney to represent him when he submitted the Form I-589 and the Form I-687, but rather that he sought the assistance of a third party who was not an attorney, there is no remedy available for an applicant who assumes the risk of authorizing an unlicensed attorney or unaccredited representative to undertake representations on his behalf. *See* 8 C.F.R. § 292.1. The AAO only considers complaints based upon ineffective assistance against accredited representatives. *Cf. Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988)(requiring an appellant to meet certain criteria when filing an appeal based on ineffective assistance of counsel). The applicant failed to fulfill the requirements listed above. Specifically, the applicant failed to provide an affidavit describing the agreement with the representative, evidence that the prior representative was informed of the allegations and given an opportunity to respond, and information regarding whether a complaint has been filed with disciplinary authorities. Therefore, the applicant is found not to have established a claim of ineffective assistance of counsel.

The applicant provided the following supporting documents in response to the notice of derogatory information from the AAO:

- A declaration from [REDACTED] dated April 10, 2008 in which the declarant stated that he has known the applicant since 1981. The declaration states, “During this time [the applicant] lived with me at my residence located on [REDACTED] [REDACTED] . . .” The declarant stated that the applicant helped with housework and the upkeep of the declarant’s vehicles, since the applicant was a minor and unable to work. The declarant stated that “[a]fter a couple of months [the applicant] decided to go back home to Mexico to finish his education. It wasn’t until 1985 that he returned to the United States where once again he moved in with me . . .” This declaration indicates that the applicant was absent from the United States from “a couple of months” after his entry to the United States in 1981 until 1985. This represents an absence of approximately three to four years. According to 8 C.F.R. § 245a.2(h)(1)(i), an applicant for temporary resident status shall be regarded as having resided continuously in the United States if, at the time of filing of the application, no single absence from the United States has exceeded 45 days, and the aggregate of all absences has not exceeded 180 days between January 1, 1982 through the date the application for temporary resident status is filed, unless the applicant can establish that due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed. The applicant’s visit to Mexico exceeded 45 days. The applicant provided no explanation for the delay in his returning to the United States. As a result, the applicant is found not to have resided continuously in the United States throughout the requisite period.
- An additional affidavit from [REDACTED] dated April 10, 2008, which states that, to the affiant’s personal knowledge, the applicant has resided in Santa Paula, California from October 1981 to present. This document contains no detail regarding how and when the affiant met the applicant, information about the origins of the affiant’s knowledge of the applicant’s residence in the United States, or any explanation of the inconsistency between this affidavit and the concurrently submitted declaration from [REDACTED]. Therefore, this affidavit will be given no weight in determining whether the applicant has established that he resided in the United States throughout the requisite period.
- An affidavit from [REDACTED] dated April 2, 2008, which states that the applicant was a customer of the affiant’s store in Ventura, California since 1981. This affidavit fails to specifically state that the applicant resided in the United States during the requisite period. In addition, this affidavit lacks detail regarding the affiant’s frequency of contact with the applicant during the requisite period or whether the applicant was absent from the United States during the requisite period. Therefore, this document will be given only minimal weight in determining whether the applicant has established that he resided in the United States throughout the requisite period.

- An affidavit from [REDACTED] dated April 8, 2008, which states that the affiant is able to determine the date of the beginning of his acquaintance with the applicant in the United States from the fact that he has been good friends with the applicant since meeting at work about 25 years ago. This affidavit also fails to specifically state that the applicant resided in the United States during the requisite period. In addition, this affidavit lacks detail regarding the affiant's frequency of contact with the applicant during the requisite period, whether the applicant was absent from the United States during the requisite period, and where they worked together when they met. Therefore, this document will be given only minimal weight in establishing that the applicant resided in the United States from April 1983 to the end of the requisite period.
- An extract translation of a school record from Spanish to English. This document indicates that the applicant completed the basic requirements for 10th, 11th and 12th grades with Technical High School #49 and was presented with a certificate in [REDACTED] on June 28, 1985. When considered with other evidence in the record including the applicant's statements on his Form I-589, his failure to list any addresses in the United States prior to February 1985 on his Form I-687, and the statements of [REDACTED] this document casts doubt on the applicant's claim to have resided continuously in the United States throughout the requisite period.
- Copies of Spanish language documents appearing to list the applicant's course work with Technical High School #49 during the school years from 1982 to 1983 and 1983 to 1984. These documents tend to show that the applicant was a student in Mexico during these times and, therefore, did not reside continuously in the United States during the requisite period.

In summary, the applicant has provided attestations that do not conform to regulatory standards, fail to indicate that the applicant resided in the United States during the requisite period, lack sufficient detail, indicate that the applicant did not reside in the United States continuously throughout the requisite period, or are inconsistent with each other. He has provided other documents that also tend to show that he was absent from the United States for a significant portion of the requisite period.

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 contradictions among the applicant's Form I-687, his Form I-589, and the documents he submitted, and given his 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 for the requisite period 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.