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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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Services

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FILE: [REDACTED]
MSC-06-101-14688

Office: SACRAMENTO

Date: APR 27 2009

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:

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. If your appeal was sustained, or if your case was remanded for further action, you will be contacted. If your appeal was dismissed or rejected, 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.

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, Sacramento. 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 (together comprising the I-687 Application). The director denied the application because the applicant failed to explain his inconsistent testimony as to when he began residing in the United States and failed to address evidence in the record that he went to Mexico in 1985 after being released from jail.

On appeal, the applicant asserts that he has resided in the United States continuously throughout the requisite period and submits additional evidence to substantiate his claim. Further, the applicant claims that he is not inadmissible because he believes he was voluntarily returned, not deported, to Mexico in 1985.¹

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)(1) 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).

¹ The applicant indicates that he wants to appeal the decision denying his waiver application; however, he failed to timely file a separate appeal for that decision.

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. 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, "[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 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 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.

On appeal, the applicant claims that he was voluntarily returned, not deported, to Mexico following his release from jail in Yakima, Washington in 1985. The applicant stated during his interview on March 12, 2007 that he was sent back to Mexico in 1985 after serving 32 days in Yakima County jail. During his suspension of deportation hearing in September 2004, the applicant also testified that Immigration and Naturalization Services returned him to Mexico in 1985 after being jailed for 28 days in Yakima, Washington.²

At issue in this proceeding is whether the applicant has furnished sufficient credible evidence to establish by a preponderance of the evidence that he has resided continuously in the United States throughout the requisite period since before January 1, 1982.

The record does not reflect the date when or if the applicant was sent back to Mexico in 1985. The AAO does not find that his 1985 departure was under an order of deportation even though the 1985 departure may be material to the question of the applicant's continuous residence in the United States during the requisite period. Further, the AAO cannot determine whether the applicant's absence from the United States in 1985 exceeded the maximum allowable time for a single absence pursuant to the regulations since no information about that departure is found in the record. As the applicant is not otherwise eligible for the benefit, this issue will not be addressed.

During his interview with a United States Citizenship and Immigration Service (USCIS) officer on March 12, 2007, the applicant stated that he had resided in the United States continuously since 1979 and throughout the requisite period. As evidence of his continuous residence in the United States throughout the requisite period, the applicant submitted four affidavits, two signed declarations by a former employer and supervisor, and a letter from his church.

in her affidavit and signed declaration claims that she was a crew supervisor at Nalbandian Sales Inc., where the applicant worked as a farm laborer from early 1982 to the end of the harvest season in 1985. She states further that the applicant and his family lived at [REDACTED] Arvin, California, during that period. A review of the applicant's Form I-687, however, reveals that the applicant has never resided in Arvin, California. The applicant also did not list an employment with Nalbandian Sales, Inc. on his application for temporary resident status. Additionally, the affiant fails to provide detail in her affidavit concerning the applicant's employment with Nalbandian Sales, Inc. For instance, while the affiant states that Nalbandian Sales, Inc. was sold in 1985, she does not indicate with specificity how she dated her acquaintance with the applicant, whether the information provided is based on the successor company's records, and whether USCIS can have access to such records, if any. The lack of detail in the affidavit coupled with the inconsistency in the evidence as noted above weakens the probative value of the affidavit. The affidavit has minimal probative value as evidence of the applicant's residence in the United States during the requisite period.

[REDACTED] claims in his sworn statement that the applicant worked for him as an agriculture worker from 1983 to January 1985. He also notes that the applicant used a social security number [REDACTED] to work during this period. Under the regulations at 8 C.F.R. § 245a.2(d)(3)(i), letters or affidavits from past employers must contain specific information to be probative and credible. In this case, the author fails to provide information about where the applicant resided at the time of employment, the exact period of his employment, what his specific duties with the company were, whether or not the information was taken from official company records, and where such records are located and whether USCIS may have access to the records. Thus, the letter will be given minimal weight. Further damaging the credibility of the affidavit is the applicant's failure to specifically list his employment with [REDACTED] on his Form I-687.

[REDACTED] in her affidavit states that the applicant worked at [REDACTED] for a total of 110 days from May 1, 1985 to May 1, 1986. [REDACTED] in his signed declaration provides identical information about the applicant's employment at [REDACTED]. Like the affidavit from [REDACTED] the affidavit and the signed declarations from [REDACTED] and [REDACTED] have minimal probative value since both authors fail to provide specific information concerning the applicant's employment as prescribed by the regulations. The applicant's Form I-687 also lists no employment with [REDACTED].

The affidavit from Superior Farming Company contains the specific information concerning the applicant's employment as prescribed by the regulations, and thus will be given some weight as

A review of the record reveals that the applicant's request for suspension of deportation under section 240A(b) of the Act was denied on September 14, 2004, and the immigration judge ordered him to voluntarily leave the United States within 60 days of the date of the decision with an alternate order of deportation should the applicant fail to depart as required. On November 1, 2005, the Board of Immigration Appeals (BIA) dismissed the applicant's appeal and reinstated the immigration judge's order. The applicant failed to leave the United States within 60 days of the BIA order, and therefore, the AAO finds that the applicant is inadmissible, and thus ineligible for temporary resident status. Section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii); Section 245A(a)(4) of the Act, 8 U.S.C. § 1255a(a)(4).

Finally, the AAO notes that the applicant was arrested in Yakima, Washington, on September 7, 1985 under the name [REDACTED] for possession of a controlled substance (heroin), in violation of section 69.50.401(d) of the Washington Revised Code, *possession of a controlled substance: heroin, a felony*. The record contains court documents that reflect the applicant was granted a deferred prosecution in the Washington Superior Court for Yakima County with a docket number 85-00820-66 on October 2, 1985. These documents show that prosecution was deferred and the applicant was sentenced to one year probation and ordered to pay court costs and a fine to the Crime Victims Compensation Fund.

Before entry of the order deferring prosecution, the applicant, among other things, was required to stipulate to the admissibility and sufficiency of the facts contained in the written police report and acknowledge that the statement would be entered and used to support a finding of guilty if the court found cause to revoke the order granting deferred prosecution. Section 10.05.020 of the Revised Code of Washington. The record contains a copy of the Waiver and Agreement of Defendant Regarding Order Authorizing Deferred Prosecution. The AAO finds that the applicant has been convicted, for immigration purposes, within the meaning of Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A). First, the applicant has admitted sufficient facts to warrant a finding of guilt. Second, the judge ordered some form of punishment, penalty, or restraint on the applicant's liberty. Specifically, the judge ordered the applicant to serve 1 year probation and pay a fine.

The record indicates that on March 8, 1996 the court dismissed the criminal action against the applicant following completion of probation. Nevertheless, the conviction remains valid for immigration purposes. In applying the definition of a conviction under section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A) the Board of Immigration Appeals found that there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships. Thus, if a court vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a "conviction" within the meaning of section 101(a)(48)(A) of the Act. If, however, a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the respondent remains "convicted" for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *see also Matter of Roldan*, 22 I&N

Dec. 512 (BIA 1999). In this case, there is no allegation or evidence that there were any legal defects in the underlying criminal proceedings upon which the court dismissed the criminal action against the applicant on March 8, 1996. The applicant is convicted of a felony and is ineligible for temporary resident status. For this additional reason the application may not be approved.

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