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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

L1

FILE:

MSC 05 141 10684

Office: NEW YORK

Date:

FEB 17 2009

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 if your case was 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, New York. 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 for temporary residence on account of the applicant's failure to establish residence for the requisite period of time. The director concluded that the applicant was not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements.

The applicant represents himself on appeal. On the Notice of Appeal (Form I-694), the applicant states that the "reasons for appeal is (sic) attached." In support of his appeal, the applicant also submitted a notarized statement from [REDACTED] dated January 16, 2007. [REDACTED] states that she has known the applicant for 21 years and that he has performed community service with the [REDACTED] Community Center.

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)(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).

Furthermore, an alien who has been convicted of a felony or of three or more misdemeanors committed in the United States is ineligible for adjustment to Lawful Permanent Resident status. 8 C.F.R. § 245a.18(a)(1). "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 term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where - (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Section 101(a)(48)(A) of the Immigration and Naturalization Act (Act), 8 U.S.C. § 1101(a)(48)(A).

The AAO has reviewed the evidence of record in the file. The AAO notes that the applicant was interviewed by a USCIS adjudications officer on November 1, 2006. At the conclusion of the interview, the applicant was directed to provide official court dispositions regarding a series of offenses committed in New York. The applicant complied with this directive and supplied official court documents with his Notice of Appeal.

The documents reveal that on July 5, 2004 the applicant was charged with violating the following sections of the New York Penal Code: section 240.20 – *disorderly conduct*, section 165.71 – *trademark infringement*, and section 20-453 – *failure to procure vendor's license*. The applicant pleaded guilty to one count of disorderly conduct, and was sentenced to serve one year of probation and one day of community service. The remaining charges were dismissed. On October 31, 2004, the applicant was again charged with the three offenses listed above. The applicant pleaded guilty to one count of disorderly conduct, and was sentenced to serve one year of probation and three days of community service. The remaining charges were dismissed. Ultimately, on January 22, 2005 the applicant was again charged with the three offenses listed above and pleaded guilty to one count of disorderly conduct, and was sentenced to serve one year of probation and four days of community service. The remaining charges were dismissed.

The offense of disorderly conduct is considered a "violation" under New York law. *See* Part 2, Title E, section 55.10 of the New York Penal Code. The AAO has researched the definition of a

“violation” in its analysis of the New York Penal Code. In the state of New York, violations are not considered crimes. Although a violation carries a potential fifteen day jail term, in almost all cases the punishment imposed includes a fine and/or community service. In this case, the record indicates that the applicant was sentenced to perform community service and to a term of probation. There is no indication that the applicant was ordered to pay a fine. Thus, the AAO concludes that the applicant’s three convictions for disorderly conduct are not the equivalent of a conviction for a criminal offense under New York law.

Nonetheless, the applicant’s three disorderly conduct convictions *are* considered misdemeanor offenses for purposes of analysis under the Immigration and Nationality Act. As noted above, "misdemeanor" means a crime committed in the United States punishable by imprisonment for a term of *one year or less*, regardless of the term such alien actually served. 8 C.F.R. § 245a.1(p). The disorderly conduct conviction, although considered a “violation” in New York, carries a maximum 15 day term of imprisonment, and therefore qualifies as a “misdemeanor” for immigration purposes. The applicant’s three misdemeanor convictions are sufficient to disqualify him for temporary residence under the terms of the settlement agreements.

Additionally, the applicant must 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 only 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 is the notarized statement from [REDACTED] listed above.

The statement from [REDACTED] fails, however, to establish the applicant’s continuous unlawful residence in the United States for the duration of the requisite period. As stated previously, an applicant must provide evidence of eligibility apart from his or her own testimony; and the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility.

[REDACTED]’s statement does not provide concrete information, specific to the applicant and generated by the asserted associations with him, which would reflect and corroborate the extent of those associations and demonstrate that they were a sufficient basis for reliable knowledge about the applicant’s residence during the time addressed in the affidavits. To be considered probative and credible, witness affidavits must do more than simply state that an affiant knows an applicant and that the applicant has lived in the United States for a specific time period. Their content must include sufficient detail from a claimed relationship to indicate that the relationship probably did exist and that the witness does, by virtue of that relationship; have knowledge of the facts alleged. Upon review, the AAO finds that, the witness statement in this matter does not indicate that her assertions are probably true. Therefore, it will be accorded little probative value.

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, continuously resided in an

unlawful status in the United States for the requisite period, and is otherwise eligible for adjustment of status, as required under both 8 C.F.R. § 245a.2(d)(5) and *Matter of E- M--*, *supra*. The applicant has not met his burden of proof because of his failure to establish residence and because of his three misdemeanor convictions. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis. 8 C.F.R. § 245a.18(a)(1).

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