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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NATIONAL BENEFITS CENTER Date: JAN 13 2009

MSC-05-131-11694

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 of the National Benefits Center (NBC), Lee's Summit, and 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 and determined that the applicant is ineligible for temporary resident status pursuant to Section 245A of the Immigration and Nationality Act (Act). Specifically, the director noted that the applicant had failed to submit a certified court record reflecting the disposition of criminal charges, and also failed to submit any evidence substantiating his claim that he entered the United States before January 1, 1982 and resided continuously in the United States throughout the requisite period.

On appeal, the applicant submits a certified copy of his conviction record from the Pennsylvania Criminal Court in 2002. The applicant states on appeal that he entered the United States before January 1, 1982 and has resided continuously in the United States in an unlawful status until 1990. The applicant additionally claims to have only left the United States once for 30 days in 1990. No additional evidence relating to his claim of residence in the United States during the statutory period is submitted. On appeal, the applicant waives his right to submit a written brief or statement.

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 burden is upon the applicant to prove 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). 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.

The sole issue here is whether the applicant has met his burden of proving by a preponderance of the evidence that he is eligible for temporary resident status pursuant to Section 245A of the Act.

As stated above, the applicant provided no evidence to show that he entered the United States before January 1, 1982 and has resided continuously in the United States in an unlawful status for the duration of the requisite period. Pursuant to 8 C.F.R. § 245a.2(d)(6) regarding sufficiency of evidence, an applicant for temporary resident must provide evidence of eligibility apart from his or her own testimony. Because the applicant in this case has failed to submit any evidence in connection with his claim of residence in the United States for the duration of the requisite period, his application for temporary resident status pursuant to Section 245A of the Act may not be approved.

Moreover, evidence of record found in the applicant's asylum hearing transcript reflects that the applicant stated before an Immigration Judge (IJ) that he first arrived in the United States at New York, New York on October 5, 1993, and further indicated that he had no prior admissions to the United States and has never left the United States after his arrival in New York in 1993. The

applicant's statements during his asylum hearing seriously damage his credibility and his claim of eligibility for the benefit. The applicant's Form I-94 further shows that the applicant was admitted as a nonimmigrant visitor in New York on October 5, 1993.

Further damaging the applicant's credibility are the inconsistencies between what the applicant states on appeal and what he indicated on his Form I-687 regarding his absence from the United States. The applicant states on appeal that he entered the United States before January 1, 1982 and resided in the United States continuously until 1990, when he left the United States for 30 days. At part #32 of his Form I-687, however, the applicant indicated that he visited Senegal from January 1988 to October 1993. 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). Doubt cast on any aspect of the applicant's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the application. *Id.* at 591. Since the applicant has made conflicting statements about his absences from the United States during the statutory period, his claim of continuous residence in the United States since before January 1, 1982 is not probative as evidence of eligibility for the benefit sought.

Beyond the decision of the director, the applicant is inadmissible to the United States and is thus ineligible for the benefit. Section 245A(a)(4)(A) of the Act, 8 U.S.C. § 1255a(a)(4)(A), requires an alien to establish that he or she is admissible to the United States as an immigrant in order to be eligible for temporary resident status. An alien is inadmissible if he has been convicted of a crime involving moral turpitude (other than a purely political offense), or if he admits having committed such crime, or if he admits committing an act which constitutes the essential elements of such crime. Section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I).

Although the Immigration and Nationality Act does not define crimes of moral turpitude, traditionally these crimes have often involved fraud. *Jordan v. DeGeorge*, 341 U.S. 223, 227. Courts have also included in this category statutory rape, *Castle v. INS*, 541 F.2d 1064, 1066 (4th Cir.1976), child abuse, *Guerrero de Nodahl v. INS*, 407 F.2d 1405, 1406-07 (9th Cir.1969), and indecent assault, *Marinelli v. Ryan*, 285 F.2d 474, 476 (2d Cir.1961).

The most commonly accepted definition of a crime involving moral turpitude is an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man. *Jordan v. De George*, 341 U.S. 223, *reh'g denied*, 341 U.S. 956 (1951). Whether a particular crime involves moral turpitude "is determined by the statutory definition or by the nature of the crime not by the specific conduct that resulted in the conviction." *McNaughton v. INS*, 612 F.2d 457, 459 (9th Cir.1980); *see Castle*, 541 F.2d at 1066.

The record reflects that on September 11, 2002, the applicant was convicted in the Criminal Court of Philadelphia County, Pennsylvania, of Tampering with Records or Identification, a violation of Pennsylvania Criminal Code Section 4104(a), a Class 1 misdemeanor. The applicant was sentenced

to two years' probation, and ordered to pay restitution, fines and costs. Case no. The AAO finds that this conviction is for a crime of moral turpitude within the meaning of the law.

The Pennsylvania Criminal Code at 18 Pa. C.S.A. Section 106(b)(6) provides that the penalty for violating a Class 1 misdemeanor may be imprisonment for not more than five years.

Section 212(a)(2)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(ii)(II) provides for an exception to inadmissibility of an alien convicted of only one crime of moral turpitude if:

> the *maximum* penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of six months (regardless of the extent to which the sentence was ultimately executed).

(Emphasis added).

The applicant does not qualify under this exception as the maximum penalty for the crime may be imprisonment in excess of five years. The applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I) due to his conviction. No waiver of such ineligibility is available. For this additional reason, the application must be denied.

The inconsistencies in the record and the absence of credible and probative documentation to corroborate the applicant's claim of continuous residence for the entire requisite period, seriously detract from the credibility of his 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 inconsistencies in the record and the lack of credible supporting documentation, it is concluded that the applicant has failed to establish by a preponderance of the evidence that he has 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.

Although the applicant in this case was not interviewed by an immigration officer in connection with his application for temporary resident status, remanding this matter for additional proceedings would serve no useful purpose, as the evidence of record establishes that the applicant is inadmissible to the United States for his conviction of a crime involving moral turpitude. As the applicant is inadmissible to the United States, he is ineligible to adjust to temporary resident status. Section 245A(a)(4)(A); 8 U.S.C. § 1255a(a)(4)(A).

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