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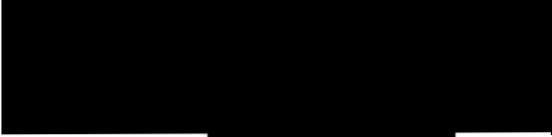
U.S. Department of Homeland Security  
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U.S. Citizenship  
and Immigration  
Services

L1



FILE:



Office: LOS ANGELES

Date: JAN 21 2009

MSC 05 194 11126

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:



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, Houston. 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 because the applicant was convicted of four misdemeanor offenses in the state of Texas. The director, therefore, 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 is represented by counsel on appeal. Counsel maintains that the applicant has two misdemeanor convictions, and therefore remains eligible for temporary residence status. In support of his assertions, the applicant submitted his own sworn affidavit dated March 22, 2007, and a Certificate of Disposition from the Harris County District Clerk dated October 19, 2006.

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).

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.

Additionally, 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).

Under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the INA, no effect is to be given, in immigration proceedings, to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction. An alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt. *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999). State rehabilitative actions that do not vacate a conviction on the merits as a result of underlying procedural or constitutional defects are of no effect in determining whether an alien is considered convicted for immigration purposes. *Matter of Roldan, id.*

The Certificate of Disposition offered by the applicant in support of his appeal states that the applicant has two misdemeanor convictions for *Driving Under the Influence of Drugs/Alcohol (DUI)* in the state of Texas: (1) on October 25, 1985, the applicant pleaded guilty to DUI and was sentenced to three days in the Harris County jail and was ordered to pay a fine of \$250 (Docket No. [REDACTED]) (2) on April 20, 1992, the applicant pleaded guilty to DUI and was sentenced to fifteen days in the Harris County jail and was ordered to pay a fine of \$300 (Docket No. [REDACTED]). Both offenses are considered Class A misdemeanors in the state of Texas. Thus, the applicant avers in his affidavit that his two misdemeanor convictions do not disqualify him for temporary resident status under the terms of the settlement agreements.

The AAO has reviewed the evidence of record and we note a conflict between the information contained in the Certificate of Disposition and other records in the file. The record before the AAO contains a sworn statement issued by the Baytown Police Department dated October 16, 2006. The statement indicates that a search of police records was made under the name and date of birth for the applicant. The search confirms that the applicant has four criminal charges in the state of Texas: (1) September 13, 1985 – *Driving While Intoxicated*, (2) February 23, 1992 - *Driving While Intoxicated*, (3) February 9, 1996 – *Public Intoxication*, and (4) October 5, 2002 - *Public Intoxication*.

Additionally, the applicant was interviewed before a U.S. CIS adjudications officer on October 18, 2006. Notes from the interview indicate that the applicant admitted to four convictions for the four charges listed above. The record also reveals that the applicant received the benefit of counsel during his interview. Therefore, it is unlikely that counsel would have permitted the applicant to admit to criminal charges for which he was not convicted. At the conclusion of the interview, the applicant and counsel were both issued a Request for Evidence (Form I-72) that requested a clarification of the criminal charges. In response, the applicant submitted the Certificate of Disposition discussed above and no further evidence regarding the ultimate disposition of the 1996 and 2002 charges for *Public Intoxication*.

At issue in this proceeding is whether the applicant has established that he resided in the United States throughout the statutory period and whether he met his burden of establishing that he is otherwise admissible to the United States, that he does not have a disqualifying criminal conviction, and that he is eligible to adjust to lawful permanent resident status. Here, the applicant has not met his burden of proof to demonstrate admissibility on account of his inability to resolve the conflict in the evidence regarding the four criminal charges and two convictions discussed above. *See* section 245A(b)(1)(C)(ii) of the Act; 8 C.F.R. § 103.2(b)(2)(i) and (ii); 8 C.F.R. 245a.3(g)(5).

In this case, public records indicate that the applicant has four criminal charges. The applicant admitted as much during his interview. He has provided acceptable proof of convictions for two of the four charges. However, he has not provided any proof regarding the remaining two charges. It is not sufficient for the applicant to state that his criminal convictions are limited to two offenses, or to imply that additional evidence regarding the disposition of other criminal charges does not exist or is simply unavailable.

In order to prevail on this issue, the applicant must show that the evidence is unavailable. Any letter that is submitted to show that a criminal record is unavailable must be: (1) an original, (2) on letterhead, and (3) from the relevant government authority that serves as the custodian of records. 8 C.F.R. § 103.2(b)(2)(ii). The government letter must indicate the reason the record does not exist and also indicate whether similar records for the time and place are available. The applicant must then submit relevant “secondary evidence.” If the applicant cannot submit secondary evidence, then he or she must establish that secondary evidence is unavailable and must do so on official letterhead. The applicant must then submit at least two affidavits from persons who are not party to the application and who have direct knowledge of the event and circumstances. In criminal record cases, the evidence would include affidavits from the prosecuting attorney, the defense attorney, the judge, or some other individual (other than derivative family members) who has direct knowledge of the disposition of the arrest.

In this case, the applicant has submitted none of the information discussed above. 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.

As noted above, to meet his burden of proof, the applicant must provide evidence of eligibility apart from his own testimony, and in this case he has failed to do so. The applicant has not overcome the deficiencies in the evidence noted by the Director. Therefore, he has failed to establish by a preponderance of the evidence that he has no disqualifying criminal convictions and is otherwise admissible to the United States, as required under both 8 C.F.R. § 103.2(b)(2)(i) and

(ii); 8 C.F.R. 245a.3(g)(5). 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.