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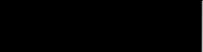
U.S. Citizenship
and Immigration
Services

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FILE:



Office: LOS ANGELES

Date:

JAN 23 2009

MSC 06 102 10638

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 "J. 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, 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 (together comprising the I-687 Application). The Director denied the application for temporary residence because the applicant had been convicted of one count of felony welfare fraud. 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 represents himself on appeal. In lieu of explaining his reasons for appeal on the Notice of Appeal (Form I-694), the applicant attached a copy of a minute order issued by the Superior Court of California, County of Los Angeles, dated April 5, 2005. The order reveals that on June 11, 2001, the applicant's four¹ felony convictions were reduced to misdemeanor convictions, probation was terminated, and the case was "dismissed pursuant to section 1203.4 of the [California] Penal Code."

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

¹ The AAO notes that it is unclear why the minute order lists one count of welfare fraud and three counts of perjury, as the perjury charges were dismissed pursuant to the terms of a plea agreement.

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 issue in this proceeding is whether the applicant has furnished sufficient credible evidence to meet his burden of establishing continuous unlawful residence in the United States for the duration of the requisite period, that he has no disqualifying criminal convictions, and that he is otherwise admissible to the United States. Here, the applicant has failed to meet this burden.

The record before the AAO reveals that the applicant has multiple criminal convictions. 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 record contains court documents that reflect that on September 6, 1996, the applicant was charged with one count of violating section 10980(C)(2) of the California Welfare and Institutions Code – *Welfare Fraud*, and eight counts of violating section 118 of the California Penal Code – *Perjury* (Docket No. [REDACTED]). These offenses are considered felonies under California law. On November 20, 1996, the applicant pleaded *nolo contendere* to the charge of welfare fraud. The remaining eight counts of felony perjury were dismissed pursuant to a plea agreement. The court ordered that the imposition of sentence be suspended. The applicant was sentenced to report weekly to a probation officer for five years, ordered to perform 200 hours of community service and to pay restitution in the amount of \$7,326.

The record before the AAO also reveals that on April 4, 1996, the applicant pleaded *nolo contendere* to violating section 23152(B) of the California Vehicle Code – *Driving with a Blood Alcohol Level of .08% or More*. The applicant was ordered to serve ten days in the county jail and sentenced to three years of probation. The punishment for this offense, a misdemeanor under California law, also included the payment of a fine of \$390 and a state penalty fund assessment of \$612. The applicant's driver's license was suspended effective July 26, 1996 until such time as the applicant could demonstrate payment of the fines and penalties. The AAO notes that because this is a conviction for a single misdemeanor, it is not a disqualifying criminal conviction for purposes of establishing temporary residence status. 8 C.F.R. § 245a.18(a)(1).

The AAO notes that the applicant did not identify any arrests or convictions on his application for temporary residence (*See* No. 37, Form I-687). The applicant signed the Form I-687 under penalty of perjury that all of the information contained therein was true and correct (*Id.*, No. 43). The AAO finds that the applicant's false attestation regarding his criminal history is an act of perjury which further undermines his eligibility for temporary resident status under the terms of the settlement agreements.

On appeal, the applicant appears to imply that because his conviction for welfare fraud was reduced from a felony to a misdemeanor and then dismissed, he remains eligible for temporary resident status. The AAO finds this argument to be without merit.

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.*

In this case, there is no evidence in the record to suggest that the applicant's felony conviction for welfare fraud was dismissed as a result of any procedural or constitutional error committed during the trial court proceedings. The court's post-conviction relief granted to the applicant was clearly intended to avoid the immigration consequences of a felony conviction. As noted above, no effect may be given to state court actions which purport to erase the original determination of guilt. *Matter of Roldan, id.* Thus, the applicant's felony conviction for welfare fraud remains valid for immigration purposes and serves to disqualify him for temporary residence under the terms of the settlement agreements.

The applicant stands convicted of a felony offense. He is therefore ineligible for temporary resident status pursuant to 8 U.S.C. §1255a(4)(B); 8 C.F.R. § 245A.4(B). No waiver of such ineligibility is available. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis. The decision of the Director is affirmed.

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