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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office MS 2090
Washington, DC 20529-2090



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FILE: [REDACTED]
MSC 04 314 11007

Office: FRESNO

Date:

JUN 11 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:

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.

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, Fresno. 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 could not provide credible evidence that he entered the United States prior to January 1, 1982 and resided continuously in an unlawful status for the requisite period. Specifically, the director noted conflicts in the evidence submitted by the applicant and that such conflicts remained unresolved. 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.

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.

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.

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 sufficiently credible evidence to meet his burden of establishing continuous unlawful residence in the United States for the duration of the requisite period, and that he is otherwise admissible to the United States. Here, the applicant failed to meet this burden.

The AAO has reviewed all of the evidence in the file in its entirety. We note that the evidence of record includes, in addition to the application for temporary residence (Form I-687) presently before the AAO, an application for permanent residence (Form I-485) pursuant to the LIFE Act submitted on October 28, 2001. The director denied the Form I-485 on July 1, 2004, finding that the applicant had not established entry and unlawful residence in the United States for the requisite

period despite the request for such evidence in the Request For Evidence (Form I-72) issued on December 10, 2002 and Notice of Intent to Deny (NOID) issued on February 18, 2004.¹

The AAO notes that the requirements for eligibility for temporary residence pursuant to Section 245A of the INA (Form I-687) are similar in some respects to the requirements for permanent residence pursuant to Section 1104 of the Legal Immigration Family Equity (LIFE) Act of 2000 (Form I-485). At minimum, an applicant for either benefit has the burden of proving by a preponderance of evidence that he or she has continuously resided in an unlawful status in the United States from January 1, 1982 to May 4, 1988, and is otherwise admissible to the United States under the provisions of section 212(a) of the INA.

Because the applicant in this case could not provide credible evidence of at least one element of eligibility common to both Section 245A of the INA and the LIFE Act, *i.e.*, entry into the United States prior to January 1, 1982, the AAO must examine the record to determine if the applicant submitted any new evidence of eligibility which would overcome this deficiency as noted in both the NOID issued on February 18, 2004 in support of the Form I-485, as well as the NOID issued on May 27, 2008 in support of the Form I-687 currently under review. We note that he has not done so.

The record before the AAO contains a photocopy of an Affidavit for Determination for Class Membership In CSS v. Meese signed by the applicant on June 23, 1991. Item No. 6 indicates that the applicant claimed to have entered the United States without inspection sometime in October, 1981. However, at his interview conducted on August 25, 2006 in support of the application for temporary residence, the applicant stated that he first entered the United States on May 4, 1980. On appeal, the applicant denies having made this statement, but he provides no objective evidence to support his claim of entry other than his own assertions. As noted above, to meet his burden of proof, an applicant must provide evidence of eligibility apart from his own testimony. 8 C.F.R. § 245a.2(d)(6). The applicant has failed to reconcile this inconsistency in the record such that his claim of entry prior to January 1, 1982 is not credible.

The record also contains an affidavit from [REDACTED] dated June 23, 1991, wherein Mr. [REDACTED] states that he has known the applicant since November, 1981. A second affidavit from [REDACTED] avers that he has known the applicant since May 20, 1991. The record contains additional affidavits from [REDACTED], and [REDACTED] that contain statements that the affiants have known the applicant for several years and that they attest to the applicant being physically present in the United States during the required period. These affidavits fail, however, to establish the applicant's continuous unlawful residence in the United States for the duration of the requisite period. As stated previously, the evidence must be evaluated not by the quantity of evidence alone but by its quality; an applicant must provide

¹ In response to the NOID issued in the LIFE Act application, the applicant submitted a translated copy of his Indian birth certificate and court documents regarding his 1995 criminal conviction, but no evidence of entry and residence for the requisite period.

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.

None of the witness statements 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, individually and together, the witness statements do not indicate that their assertions are probably true. Therefore, they have little probative value.

The applicant states on the Form I-687 at Item No. 30 that his first residence in the United States was [REDACTED] from October, 1981 to May, 1991. However, the applicant has submitted no documentary evidence to corroborate this address, such as copies of a lease agreement, rental receipts, utility bills, or mail postmarked for the relevant time period and delivered to him at that address.

The record also contains photocopies of tax returns for years not relevant to the qualifying time period. Additionally, the record contains an affidavit from [REDACTED] dated June 22, 1991 wherein [REDACTED] avers that the applicant traveled to Canada to visit him from June 15, 1987 to July 3, 1987. The record also includes a statement from an employer with accompanying earnings statements that indicate the applicant was employed by "Quick 'N' E-Z" on in 2001, and that the applicant has been so employed since 1999. None of this evidence viewed collectively and individually, serves to establish that the applicant entered the United States on or before the qualifying period, and remained here in an unlawful status up to and including May 4, 1988. The AAO concludes that the applicant has not established eligibility for temporary resident status in accordance with the terms of the settlement agreements.

The AAO notes that the record also reveals that the applicant has a California state misdemeanor conviction for one count of violating section 647.6 of the California Penal Code – *molesting a child under 18*. The applicant was sentenced to six months in jail and three years probation on May 26, 1995. Additionally, the court required that the applicant register as a sex offender and attend family counseling. The AAO has reviewed the statute under which the applicant was convicted, and we note that the statutory maximum sentence to which the applicant was exposed is one year in jail and/or a fine up to \$5000.

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).

"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).

Additionally, an applicant who has been convicted of a crime involving moral turpitude (CIMT) is inadmissible, and therefore ineligible for temporary resident status. However, an alien with *one* CIMT is not inadmissible if he or she meets the petty offense exception. See 8 U.S.C. § 1182(a)(2)(A)(ii). A CIMT will meet the petty offense exception if “the maximum penalty possible for the crime of which the alien was convicted . . . did not exceed imprisonment for one year and . . . the alien was not sentenced to a term of imprisonment in excess of 6 months.” *Lafarga v. INS*, 170 F.3d 1213, 1214-15 (9th Cir. 1999) (quoting 8 U.S.C. § 1182(a)(2)(A)(ii)(II)); see also *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 843-46 (9th Cir. 2003).

In this case, the applicant has one misdemeanor conviction that meets the petty offense exception inasmuch as the record contains no evidence of other criminal convictions and the applicant was exposed to a one year maximum sentence and actually sentenced to six months in jail. Furthermore, as this case arises within the jurisdiction of the Ninth Circuit Court of Appeals, the law of that circuit provides controlling precedent. The Ninth Circuit has ruled that a conviction under section 647.6 of the California Penal Code – *molesting a child under 18*, is not categorically a CIMT. See *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 997-1008 (9th Cir. 2008). Thus, the AAO concludes that the applicant's 1995 criminal conviction is not a disqualifying conviction for immigration purposes.

Nevertheless, the applicant has not met his burden of proof to establish eligibility for temporary residence status because he has not provided credible, probative and internally consistent evidence that he initially entered the United States on or before January 1, 1982 and remained in an unlawful status for the requisite period. 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.