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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office MS 2090  
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U.S. Citizenship  
and Immigration  
Services

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FILE:

MSC 06 097 13474

Office: LOS ANGELES

Date:

**MAY 14 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.

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 ordered deported from the United States on or about January 18, 1984 and therefore could not establish continuous physical presence for the requisite period.

The applicant represents himself on appeal. He claims that his departures from the United States were “casual and innocent.” He also argues that the U.S. Citizenship and Immigration Services (USCIS) “failed to provide him evidence (sic) that any incident which may have occurred on January 18, 1984 was an acutal (sic) deportation, rather than a ‘turn around’ at the border.” The applicant alleges that he is eligible for temporary resident status because he has resided in the United States “continuously from before January 1, 1982 until well after May 4, 1988.”

The AAO has reviewed all of the documents in the file in their entirety. We note initially that the record before the AAO contains other applications filed by the applicant in an attempt to legalize his status in the United States, including an application for asylum (Form I-589) signed on November 23, 1999. In a hearing before an immigration judge on November 5, 2001, the applicant’s request for voluntary departure to Mexico and his request for cancellation of removal were denied, the application for asylum and withholding of removal was withdrawn, and the applicant was ordered deported to Mexico. As the November 5, 2001 order of deportation is outside of requisite time period, it does not affect the applicant’s eligibility for temporary residence.

Thereafter, the applicant signed an application for permanent residence (Form I-485) on May 30, 2002 and filed it on June 3, 2002. On August 15, 2006, the applicant was notified (Form I-72) to produce certified court dispositions for all arrests and convictions in the United States and to provide credible documentary evidence of his employment history for the requisite period. In a response to the director’s Notice of Intent to Deny (NOID) dated February 8, 2007, the applicant submitted a letter from the State of California Department of Justice dated August 24, 2006, indicating that the applicant’s fingerprints did not identify with any criminal history record maintained by the state’s Bureau of Criminal Identification and Information. Also, the applicant stated that he used his father’s social security number as employment verification between 1978 and 1984 and that the Social Security Agency was unwilling to transfer the applicant’s alleged earnings for those years to a different social security number without the employer’s issuance of

amended W-2 forms. Ultimately, the application for permanent residence was denied by the director on March 12, 2007 and no appeal of that decision appears in the present file.

What remains before the AAO is the applicant's request for temporary residence (Form I-687). 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) 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. See 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).

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, *Matter of E-M-* also stated that "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.* at 80. 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 petitioner 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 or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421, 431 (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 director denied the application because the applicant was deported during the requisite period, thus breaking any unlawful residence and presence he may have had. The AAO agrees with this determination. The record indicates that the applicant was ordered deported to Mexico on September 14, 1987, and was subsequently deported on September 25, 1987. Because the applicant was deported during the requisite period, his continuous unlawful residence and physical presence was broken. Section 245A(g)(B)(i) of the Act, 8 U.S.C. § 1255a(g)(B)(i). The director's decision is affirmed.

Beyond the decision of the director, the applicant is ineligible for temporary residence based on his criminal record. 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.* In *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), a more recent precedent decision, the Board of Immigration Appeals reiterated that if a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the alien remains “convicted” for immigration purposes.

The AAO has reviewed all of the records pertaining to the applicant’s arrests and convictions. We conclude that the applicant is not eligible for temporary resident status on multiple grounds. Initially, we note that the burden of proof to establish eligibility remains with the applicant, not the U. S. Citizenship and Immigration Services, as alleged by the applicant on the Notice of Appeal. *See* 8 C.F.R. § 103.2(b).

The documents in the record conclusively establish that the applicant was stopped by the border patrol at the San Diego airport on January 16, 1984 and charged with illegal entry, in violation of 8 U.S.C. § 1325 (Record of Deportable Alien, Form I-213). The Form I-213 also contains the notation that the applicant admitted to two prior illegal entries in January, 1983 and January, 1984, at or near Modesto, California and was twice granted the privilege of voluntary departure. The Form I-213 also indicates that the applicant admitted to four prior convictions for driving while intoxicated in Santa Ana and Modesto, California. The applicant was convicted for one count of violating 8 U.S.C. § 1325, *illegal entry*, on January 20, 1984 and sentenced to 30 days in jail by the U. S. District Court for the Southern District of California [REDACTED]. A review of the statute under which the applicant was convicted indicates that a first conviction for this offense is subject to fine under Title 18 or imprisonment for not more than 6 months, or both, and, for a subsequent commission of any such offense, is subject to a fine under Title 18, or imprisonment not more than 2 years, or both. In this instance, the applicant’s conviction for illegal entry is a misdemeanor. *See* 8 C.F.R. § 245a.1(p).

Thereafter, the records in the file indicate that the applicant was convicted on June 22, 1986 for one count of violating 8 U.S.C. § 1324(a)(2), *transporting an illegal alien*, and was sentenced to two years in prison [REDACTED]. Federal regulations dictate that this offense is considered a felony. *See* 8 C.F.R. § 245a.1(p).

In this case, the applicant has at least one felony conviction and has admitted to more than three misdemeanor offenses. The applicant is, therefore, ineligible for temporary resident status pursuant to 8 C.F.R. § 245a.3(c)(1). No waiver of such ineligibility is available. For this additional reason, the application may not be approved.

We also note that the record contains an application for temporary residence (Form I-687) signed by the applicant on January 11, 1992, but never filed with the U. S. Citizenship and Immigration Services. The applicant does not admit to any arrests or convictions in the United States on this

document and it is marked in red ink, "not valid." However, the Form I-687 presently under consideration contains a handwritten notation in red ink on Question No. 37 (referring to crimes and offenses), "arrested: 1994 drive w/susp. Lic., Santa Ana, CA." Therefore, we find the letter from the State of California Department of Justice dated August 24, 2006 indicating no match in the criminal records for the applicant's fingerprints to be directly in conflict with the applicant's admissions to various immigration officials over a period of years. The application may additionally be denied because the applicant has failed to cooperate in the verification of information necessary for full adjudication. 8 C.F.R. § 245a.3(g)(5).

Additionally, the applicant was twice ordered deported from the United States. Both orders of deportation could render the applicant inadmissible in the event he does not seek a waiver for this particular ground of inadmissibility. 8 U.S.C. § 1182(a)(9); section 212(a)(9) of the Immigration and Nationality Act.

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