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U. S. Citizenship and Immigration Services
Administrative Appeals Office MS 2090
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U.S. Citizenship
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Services

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FILE:

MSC 06 075 11150

Office: BOSTON

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, Boston. 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 stated at his interview that he had been absent from the United States beyond the maximum 45 day limit during the requisite residency period, i.e., he admitted that he departed the United States on or about January, 1988 and returned from Brazil in August, 1988. 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. The applicant states on the Notice of Appeal (Form I-694) that at the time of the interview, he was under the influence of prescription medications and “might have confused the dates.” He maintains that his departure from the United States did not exceed the maximum limit. He claims that he departed the United States for Brazil on May 20, 1988 and returned on June 15, 1988. In support of his claim, the applicant submitted a photocopy of a letter dated April 20, 2007 from the Massachusetts General Hospital directed to the applicant that lists a number of prescription and non-prescription medications. It carries no signature other than the notation, “MGH Primary Care Uniet (sic)”.

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.

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 AAO has reviewed all of the documents in the file in their entirety. Other than the applicant's own assertions, no evidence supports his contentions regarding his dates of absence from the United States. Although the applicant claims on appeal that he departed the United States for Brazil on May 20, 1988 and returned on June 15, 1988, he has submitted no credible documentary evidence to confirm this statement. For example, the applicant has not submitted any travel documents, tickets, passport stamps, or other evidence of his presence in Brazil during that time, nor has he submitted documentary evidence of his return to the United States on June 15, 1988. As noted above, the applicant must provide evidence of eligibility apart from the applicant's

own testimony. 8 C.F.R. § 245a.2(d)(6). Furthermore, the notes from the adjudications officer made during the applicant's interview establish that the applicant's statements regarding his absence from the United States were made under oath.

As noted above, the applicant must establish that he was continuously physically present from November 6, 1986 through May 4, 1988, or until he filed or attempted to file the Form I-687 application. 8 C.F.R. § 245a.2(b)(1). Any absence from the United States during this time period must be brief, casual and innocent. The applicant has failed to establish that he was continuously physically present from January, 1988 to May 4, 1988, or that his departure was brief, casual or innocent. Thus, he is ineligible for temporary resident status.

In this case, the applicant has not established his presence in the United States for the requisite period. The list of medications provided by the applicant does not establish that he was confused about his dates of absence from the United States at the time of his interview. The applicant did not provide expert testimony from a physician that the applicant was under the influence of specific medications at the time of his interview such that he was mentally incompetent to recall important dates and events relevant to the application.

In reviewing the evidence of record, the AAO notes that the applicant provided a series of court documents indicating that the applicant has multiple arrests between 1991 and 1996 in the state of Massachusetts. The charges include both criminal offenses and motor vehicle infractions: assault and battery, kidnapping, threatening to commit a crime, operating an unregistered motor vehicle, operating an uninsured motor vehicle, driving with a suspended license, speeding, violation of a protective order, operating a motor vehicle with defective equipment, driving while impeded, and other motor vehicle infractions.

In almost all cases, the charges were dismissed for lack of prosecution, or the applicant admitted sufficient facts to warrant a finding of guilt, but the court continued the case without a finding of guilt and imposed either a fine or a period of probation or both. In at least five incidents, the applicant admitted to sufficient facts to support a finding of guilt for assault and battery, driving with a suspended license and driving while intoxicated.

The director did not address the applicant's criminal history and the AAO confines its review to the director's finding that the applicant did not sustain his burden of proof regarding physical presence and residence in the United States. The AAO confirms that finding.

Beyond the decision of the director, the AAO notes that the court records submitted by the applicant reveal that he admitted sufficient facts to warrant a finding of guilt for five separate misdemeanor offenses:

- (1) *assault and battery* (Docket No. 9104 CR 532, January 25, 1991),
- (2) *driving with a suspended license* (Docket No. 9510 CR 661, February 12, 1995),
- (3) *driving with a suspended license* (Docket No. 9510 CR 2196, May 25, 1995),
- (4) and (5) *driving with a suspended license and driving under the influence* (Docket No. 9351 CR 0334, December 10, 1992).

For immigration purposes 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* (emphasis added), 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, 8 U.S.C. § 1101(a)(48)(A).

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).

Because the applicant's criminal records reveal that he has admitted sufficient facts to warrant a finding of guilt for five separate misdemeanor offenses, he is equally ineligible for temporary residence on criminal grounds also. See 8 U.S.C. §1255a(4)(B); 8 C.F.R. § 245A.4(B). No waiver of such ineligibility is available. For this additional reason, the application may not be approved.

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